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## COMMENT

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### TWENTY YEARS OF SHAREHOLDER PROPOSALS AFTER *CRACKER BARREL*: AN EFFECTIVE TOOL FOR IMPLEMENTING LGBT EMPLOYMENT PROTECTIONS

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## INTRODUCTION

*"This employee is being terminated due to violation of company policy. The employee is gay."*<sup>1</sup>

This was the reason Cracker Barrel stated for dismissing Cheryl Summerville, a cook for the restaurant chain, on her official separation notice.<sup>2</sup> Cracker Barrel fired as many as sixteen employees pursuant to a company policy, promulgated in January 1991, stating that it was "inconsistent with [Cracker Barrel's] concept and values and . . . with those of [its] customer base, to continue to employ individuals . . . whose sexual preferences fail to demonstrate normal heterosexual values which have been the foundation of families in our society."<sup>3</sup> In the face of criticism and a boycott by various groups, namely, the Atlanta chapter of Queer Nation, the Company rescinded its policy; however, at the time of the statement, the fired employees had not been rehired.<sup>4</sup> Concerned about the impact of the adverse public reaction on Cracker Barrel's sales, the New York City Comptroller's and Finance Commissioner's offices, as trustees of several of the city's pension funds that collectively owned about \$3 million of Cracker Barrel stock, submitted a shareholder proposal on behalf of the New York City Employees' Retirement System, requesting that the company formally prohibit discrimination based on sexual orientation.<sup>5</sup> In a no-action letter, "the [SEC] not only agreed that the proposal could be excluded" from the company's proxy materials but also outlined a new standard—the "*Cracker Barrel Standard*"—which dictated that employment-based shareholder proposals would "always be excludable by corporations," even if they implicated "significant social policy issues."<sup>6</sup> The 1992 Cracker Barrel shareholder proposal was the first of its kind

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<sup>1</sup> John Howard, *The Cracker Barrel Restaurants*, in CAROL HARVEY & M. JUNE ALLARD, UNDERSTANDING AND MANAGING DIVERSITY 187, 188 (5th ed. 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See id.* at 188 ("We have re-visited our thinking on the subject and feel it only makes good business sense to continue to employ those folks who will provide the quality service our customers have come to expect.").

<sup>5</sup> *Id.* at 189-90; Joseph A. Roy, *Non-Traditional Activism: Using Shareholder Proposals to Urge LGBT Nondiscrimination Protection*, 74 BROOK. L. REV. 1513, 1523-24 (2009).

<sup>6</sup> Roy, *supra* note 5, at 1524.

to raise the issue of LGBT employment protections<sup>7</sup>—after the SEC’s no-action letter, it could have been the last. However, almost twenty years after the SEC’s decision, the use of shareholder proposals to garner workplace protections for LGBT individuals has been extraordinarily successful.

This Comment explores the use of shareholder proposals for implementing reforms of corporate nondiscrimination policies as they affect LGBT employees. It argues that, particularly in the absence of comprehensive statutory employment protections for LGBT individuals, shareholder proposals have been an extremely effective tool for activists and interested shareholders to effect employment protections for LGBT employees.

Part I provides background on the extent of LGBT workplace discrimination and solutions promulgated to address the problem, including statutory measures and corporate nondiscrimination policies. Part II explains the history and use of shareholder proposals to garner LGBT employment protections. Part III describes the shareholder proposals filed between 2005 and 2012 that sought to either add or remove LGBT employment protections. Lastly, Part IV outlines the arguments typically used by shareholder-proponents of proposals seeking to add or remove LGBT employment protections and the SEC’s historical treatment of such proposals.

## I. LGBT WORKPLACE DISCRIMINATION: PROBLEMS AND SOLUTIONS

### A. *Prevalence of LGBT Workplace Discrimination*

LGBT individuals have faced a long and pervasive history of discrimination in society, particularly in the workplace. A 2012 study consolidating the findings of surveys, experiments, courts, administrative agencies, and legislatures on LGBT employment discrimination found the following:

- “As recently as 2008, the General Social Survey found that of the nationally representative sample of LG people, 37 percent had experienced workplace harassment in the last five years, and 12 percent had lost a job because of their sexual orientation;”<sup>8</sup>
- “As recently as 2011, 90 percent of respondents to the largest survey of transgender people to date reported having experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent

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<sup>7</sup> *Id.* at 1523.

<sup>8</sup> Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 721 (2012).

reported having been discriminated against in hiring, promotion, or job retention because of their gender identity;<sup>9</sup>

- Numerous reports of employment discrimination against LGBT people have been found in court cases, state and local administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books;<sup>10</sup> and
- Discrimination and harassment in the workplace can have a negative impact on the wages and mental and physical health of LGBT people.<sup>11</sup>

### B. Statutory Solutions to LGBT Workplace Discrimination

#### 1. Federal Approaches

Despite the prevalence of LGBT workplace discrimination, efforts to develop a federal statutory approach have been largely unavailing. There is currently no federal statute explicitly prohibiting employment discrimination based on sexual orientation or gender identity.<sup>12</sup> Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on “race, color, religion, sex, and national origin.”<sup>13</sup> Since the Supreme Court’s decision in *Price Waterhouse v. Hopkins* that established gender stereotyping as actionable sex discrimination under Title VII,<sup>14</sup> some lower federal courts have begun to extend this holding to offer Title VII protections to LGBT individuals.<sup>15</sup> However, such an interpretation has not been uniform among the federal circuits.<sup>16</sup>

“[F]ederal legislators have [unsuccessfully] sought to enact explicit protections for lesbian and gay workers consistently since 1973, introducing bills

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; see also, e.g., *id.* at 731 (“In 2002, the U.S. Government Accountability Office compiled a record of 4,788 state administrative complaints alleging employment discrimination on the basis of sexual orientation or gender identity filed between 1993 and 2001.”).

<sup>11</sup> *Id.* at 721; see also, e.g., *id.* at 737-38 (“Transgender respondents to a 2011 national survey were unemployed at twice the rate of the general population, and 15 percent reported a household income of under \$10,000 per year.”).

<sup>12</sup> *Id.* at 742.

<sup>13</sup> 42 U.S.C. § 2000e-2(a)(1)–(2) (2006).

<sup>14</sup> See 490 U.S. 228, 258 (1989) (plurality opinion) (“[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.”).

<sup>15</sup> Pizer et al., *supra* note 8, at 746-47.

<sup>16</sup> *Cf. id.* (“Indeed, this sound principle [acknowledging the relationship between gender identity / sexual orientation and gender discrimination] now governs in at least five circuits.”).

in [nearly] every Congress since 1994.”<sup>17</sup> The current version of the proposed Employment Non-Discrimination Act of 2013 (ENDA),<sup>18</sup> which was first introduced in 1994, would extend current federal employment protections to individuals on the basis of sexual orientation and gender identity, with exceptions for religious organizations and small businesses (those with fewer than fifteen employees).<sup>19</sup> In 2007, a version of the bill, which only offered protections for sexual orientation, passed in the House but failed in the Senate.<sup>20</sup> The current version of the bill, which includes protections for transgender individuals, passed in the Senate on November 7, 2013, and, at the time of publication, is under review by the House Subcommittee on Workforce Protections.<sup>21</sup>

## 2. State and Local Approaches

Despite the absence of comprehensive federal protections, many state and local governments have passed laws offering employment protections to LGBT employees in their jurisdictions. As of June 2013, seventeen states and the District of Columbia prohibited discrimination based on sexual orientation and gender identity, and four states prohibited employment discrimination based on sexual orientation alone.<sup>22</sup> As of 2012, of the states that did not offer statutory protection for both sexual orientation and gender identity, eleven had gubernatorial executive orders that “prohibit[ed] discrimination on either or both bases against state employees,” though these executive orders “provide[d] limited enforcement opportunities and

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<sup>17</sup> *Id.* at 760-61.

<sup>18</sup> Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013); *Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act> (last visited Feb. 21, 2014) (providing basic information about EDNA, such as its purpose and limitations).

<sup>19</sup> See *Employment Non-Discrimination Act*, *supra* note 18.

<sup>20</sup> Julie Bolcer, *With Senate Hearing, Hope for a Jumpstart on ENDA*, ADVOCATE.COM (June 12, 2012), <http://www.advocate.com/politics/2012/06/12/senate-hearing-hope-jumpstart-enda>.

<sup>21</sup> *Bill Summary & Status 113th Cong. (2013-2014) S. 815*, LIBRARY OF CONGRESS: THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.815>: (last visited Feb. 21, 2014); *Bill Summary & Status 113th Cong. (2013-2014) H.R. 1755*, LIBRARY OF CONGRESS: THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.1755>: (last visited Feb. 21, 2014); see also Ben de Guzman, *Red-Letter Day*, HUFFPOST: GAY VOICES (Nov. 13, 2013), [http://www.huffingtonpost.com/ben-de-guzman/red-letter-day\\_b\\_4256707.html](http://www.huffingtonpost.com/ben-de-guzman/red-letter-day_b_4256707.html).

<sup>22</sup> *State Nondiscrimination Laws in the U.S.*, NATIONAL GAY & LESBIAN TASK FORCE, [http://www.thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_6\\_13\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf) (last visited Feb. 21, 2014) (showing a color-coded map of the United States that displays states that ban sexual orientation discrimination and those that ban both sexual orientation and gender identity discrimination).

lack[ed] permanency.”<sup>23</sup> In addition to statewide employment protections, by 2012, at least 200 cities and counties prohibited employment discrimination based on sexual orientation, gender identity, or both.<sup>24</sup>

State and local laws, however, are limited in their ability to fully protect LGBT employees. First, local resource and capacity constraints may limit enforcement of such laws.<sup>25</sup> Second, state and local laws have also been highly vulnerable to repeal.<sup>26</sup> For example, “[i]n 2011, the Tennessee legislature passed a law prohibiting local governments from adopting broader antidiscrimination ordinances or policies than provided for by state law.”<sup>27</sup> This law, in turn, overturned a Nashville ordinance prohibiting discrimination by city contractors on the basis of sexual orientation.<sup>28</sup>

### C. Corporate Nondiscrimination Policies

Despite the patchwork statutory protections for LGBT employees, corporations are increasingly amending their nondiscrimination policies to include sexual orientation, gender identity, or both. Between 2002 and 2013, the percentage of Fortune 500 companies with sexual orientation and gender identity nondiscrimination policies increased from 61% to 88% and 3% to 57%, respectively.<sup>29</sup> In fact, 2013 was the first year in which “a majority of the Fortune 500 [companies] include[d] both sexual orientation and gender identity protections.”<sup>30</sup> An increasing number of companies are also instituting other LGBT-friendly employment policies—for example, in 2013, 62% of Fortune 500 companies offered domestic partner health benefits.<sup>31</sup>

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<sup>23</sup> Pizer et al., *supra* note 8, at 756.

<sup>24</sup> *Id.* at 757.

<sup>25</sup> *Id.* (“Several academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms, or willingness to accept and investigate sexual orientation and/or gender identity discrimination complaints.”).

<sup>26</sup> *Id.* at 758–59 (“From 1974 to 2009, over 120 ballot measures sought to repeal or prevent laws against sexual orientation or gender identity discrimination. Half of these measures passed.”).

<sup>27</sup> *Id.* at 759.

<sup>28</sup> *Id.*

<sup>29</sup> See *infra* Table 1.

<sup>30</sup> See HUMAN RIGHTS CAMPAIGN FOUNDATION, CORPORATE EQUALITY INDEX 2013, at 6 (2013), available at [http://www.hrc.org/files/assets/resources/CorporateEqualityIndex\\_2013.pdf](http://www.hrc.org/files/assets/resources/CorporateEqualityIndex_2013.pdf).

<sup>31</sup> See *infra* Table 2.

Table 1: Percentage of Companies with Sexual Orientation and Gender Identity in Corporate Nondiscrimination Policies Among the Fortune 500<sup>32</sup>

	2002	2008	2013
Sexual Orientation in Nondiscrimination Policy	61%	88%	88%
Gender Identity in Nondiscrimination Policy	3%	25%	57%

Table 2: Percentage of Companies with LGBT-Friendly Employment Policies Among the Fortune 500<sup>33</sup>

	2013
Sexual Orientation in Nondiscrimination Policy	88%
Gender Identity in Nondiscrimination Policy	57%
Domestic Partner Health Benefits	62%
Transgender-Inclusive Benefits	25%
Organizational Competency Practices	42%
Public Commitment to the LGBT Community	48%

Activists and other interested parties have used several tools to spur companies to adopt nondiscrimination policies. Each seeks to align the goals of the company's management with those of interested stakeholders. Three such tools are particularly notable. First, employee advocacy groups have motivated internal discussions between employees and management about employment policies. Second, the Human Rights Campaign's Corporate Equality Index has brought attention to companies' LGBT employment policies and has been an important tool for consumers and prospective employees seeking to purchase from or work for an LGBT-friendly company. Since 2002, the Human Rights Campaign has published its annual Corporate Equality Index, which rates companies based on LGBT-friendly employment policies.<sup>34</sup> Though the index has traditionally focused on the presence of sexual orientation and gender identity in companies' equal employment opportunity (EEO) policies, more recent publications have covered other practices, such as providing domestic partner and transgender-inclusive health benefits, requiring organizational LGBT competency (for example, through employee training), and making a "public

<sup>32</sup> HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 30, at 6.

<sup>33</sup> *Id.* at 9.

<sup>34</sup> *See id.* at 10, 12.



commitment to equality for the LGBT community.”<sup>35</sup> Businesses that receive a one-hundred percent rating on the Corporate Equality Index are named “Best Places to Work for LGBT Equality”—a distinction that may help them recruit employees.<sup>36</sup> Third, shareholder proposals, the focus of this Comment, have been effective at raising shareholders’ concerns regarding LGBT issues. As discussed further in Part II, such proposals allow shareholders to publicize these issues in the company’s proxy materials and bring them to a shareholder vote. Such proposals have been extraordinarily successful at influencing companies to adopt sexual orientation and gender identity nondiscrimination policies.<sup>37</sup>

## II. SHAREHOLDER PROPOSALS

### A. *Shareholder Proposals Generally*

Corporate law has traditionally viewed shareholders as the owners of the corporation and viewed the managers and board of directors as their agents.<sup>38</sup> Shareholders can influence company decisionmaking in a variety of ways, including electing directors, voting on extraordinary business matters (e.g., mergers, major asset sales, and dissolution), and approving changes to the bylaws or articles of incorporation.<sup>39</sup> Shareholders can also influence corporate decisionmaking through shareholder proposals—resolutions advanced by and for the consideration of the shareholders.<sup>40</sup> These proposals typically come in two varieties: (1) “[g]overnance proposals[, which] focus on traditional management issues such as executive compensation . . . and voting requirements” and (2) “[s]ocial proposals[, which] call for reports or policy changes on social or environmental issues that can impact a company’s bottom line.”<sup>41</sup> Though many shareholder proposals are nonbinding,<sup>42</sup> and few receive a majority shareholder vote, they are nonetheless effective at bringing shareholders’ concerns to the attention of management and the public.<sup>43</sup>

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<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> See *infra* subsection III.B.4.

<sup>38</sup> Adam J. Sulkowski & Kent Greenfield, *A Bridle, A Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN’S L. REV. 929, 937 (2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Understanding Shareholder Votes*, AS YOU SOW: CORPORATE SOCIAL RESPONSIBILITY, <http://www.asyousow.org/csr/understandingvote.shtml> (last visited Feb. 21, 2014).

<sup>42</sup> *Id.*

<sup>43</sup> Sulkowski & Greenfield, *supra* note 38, at 937-38.

Shareholder proponents can submit proposals in two different ways. They can send the proposals at their own expense to the other shareholders.<sup>44</sup> Alternatively, shareholders can opt to use Rule 14a-8 of the Securities Exchange Act of 1934, which, if certain criteria are satisfied, requires a company to “include a shareholder’s proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders.”<sup>45</sup> Most shareholders opt for the latter option, since the former is usually cost-prohibitive.<sup>46</sup>

### B. Requirements for Submitting a Shareholder Proposal

There are several requirements for successfully submitting a shareholder proposal for inclusion in the company’s proxy materials. First, a shareholder must have “continuously held at least \$2,000 in market value, or 1%, of the company’s securities entitled to be voted on the proposal at the meeting for at least one year by the date [he] submit[ted] the proposal.”<sup>47</sup> Second, “[e]ach shareholder may submit no more than one proposal to a company for a particular shareholders’ meeting.”<sup>48</sup> Third, “[t]he proposal, including any accompanying supporting statement, may not exceed 500 words.”<sup>49</sup> Fourth, the company must receive the proposal by the deadline determined in accordance with Rule 14a-8(e).<sup>50</sup> Failure to adhere to the requirements may result in exclusion of the proposal if the shareholder proponent does not remedy any deficiency after being notified by the company.<sup>51</sup> Additionally, the company may be permitted to exclude the shareholder proponent’s proposal from the proxy materials for the subsequent two calendar years if the shareholder proponent or a qualified representative fails, without good cause, to appear and present the proposal at the shareholders’ meeting.<sup>52</sup>

### C. Excluding a Shareholder Proposal from the Proxy Materials

In addition to procedural exclusion, a company can also exclude a shareholder proposal on substantive grounds.<sup>53</sup> If a company intends to exclude a

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<sup>44</sup> Roy, *supra* note 5, at 1517.

<sup>45</sup> 17 C.F.R. § 240.14a-8(b)(1) (2013); *see also* Roy, *supra* note 5, at 1517.

<sup>46</sup> Roy, *supra* note 5, at 1517.

<sup>47</sup> 17 C.F.R. § 240.14a-8(b)(1).

<sup>48</sup> *Id.* § 240.14a-8(c).

<sup>49</sup> *Id.* § 240.14a-8(d).

<sup>50</sup> *Id.* § 240.14a-8(e).

<sup>51</sup> *Id.* § 240.14a-8(f).

<sup>52</sup> *Id.* § 240.14a-8(h).

<sup>53</sup> *See infra* Table 3.

shareholder proposal, it must file its reasons with the SEC and provide a copy to the shareholder proponent no later than eighty days before it files its definitive proxy statement with the SEC.<sup>54</sup> The company may also seek a no-action letter from the SEC.<sup>55</sup> The “no-action” process is an informal procedure that enables the company “to obtain the informal views of the SEC staff on proposed transactions that appear to raise compliance issues under applicable federal securities laws and the rules thereunder.”<sup>56</sup> The SEC may respond to the company favorably, adversely, or refuse to respond on the merits.<sup>57</sup> A favorable no-action letter may state that the SEC “will not recommend enforcement action to the Commission if [the company] omits the proposal from its proxy materials” based on the rule relied upon in the company’s request for a no-action letter.<sup>58</sup> An adverse no-action letter may state that the SEC is “unable to concur in [the company’s] view that [it] may exclude the proposal” based on the rule relied upon in the company’s request for a no-action letter.<sup>59</sup> A reply of “no response on the merits” from the SEC may state that “the staff has indicated that legal, policy, or practical considerations may make it inappropriate for it to respond on the merits of a no-action request.”<sup>60</sup>

Part IV discusses the particular substantive grounds that companies have tried to use to modify or exclude proposals concerning nondiscrimination on the basis of sexual orientation or gender identity.

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<sup>54</sup> 17 C.F.R. § 240.14a-8(j).

<sup>55</sup> Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1019 (1987).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1031.

<sup>58</sup> *E.g.*, Alpha Natural Resources, Inc., SEC No-Action Letter, 2012 WL 36455, at \*1 (Mar. 5, 2012).

<sup>59</sup> *E.g.*, Exxon Mobil Corp., SEC No-Action Letter, 2012 WL 977660, at \*1 (Mar. 20, 2012).

<sup>60</sup> *See* Lemke, *supra* note 55, at 1033.

Table 3: Substantive Grounds for Excluding Shareholder  
Proposals Under Rule 14a-8<sup>61</sup>

Rule	Description
14a-8(i)(1)	Improper under state law
14a-8(i)(2)	Violation of law
14a-8(i)(3)	Violation of proxy rules
14a-8(i)(4)	Personal grievance; special interest
14a-8(i)(5)	Relevance
14a-8(i)(6)	Absence of power or authority
14a-8(i)(7)	Management functions
14a-8(i)(8)	Director elections
14a-8(i)(9)	Conflicts with company's proposal
14a-8(i)(10)	Already substantially implemented
14a-8(i)(11)	Duplication
14a-8(i)(12)	Resubmissions
14a-8(i)(13)	Specific amount of dividends

#### D. Literature on Shareholder Proposals

Existing literature on shareholder proposals has focused almost exclusively on the results of shareholder votes in evaluating the efficacy of shareholder proposals as a tool for effecting corporate change. This literature generally reports the following:

- Corporate governance proposals typically receive a greater level of shareholder participation than do social policy proposals, which may indicate that shareholders believe corporate governance proposals are more connected to firm value;<sup>62</sup>

<sup>61</sup> 17 C.F.R. § 240.14a-8(i) (2013).

<sup>62</sup> See, e.g., Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REG. 174, 185-86 (2001) ("[I]n 1994, social responsibility proposals rarely received more than 20% of the vote while corporate governance proposals at times received 40% . . . . In addition, although no social responsibility proposal has ever passed . . . the number of corporate governance proposals obtaining a majority . . . increase[d] dramatically in the 1990s . . . ." (footnotes omitted)); Randall S. Thomas & James F. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction*, 13 J. CORP. FIN. 368, 370 (2007) ("[N]umerous studies have differentiated between corporate governance proposals, which directly relate to issues affecting shareholder value and receive

- The type of shareholder proponent influences shareholder support of the proposals. Institutional investors, for example, tend to garner more support for their proposals than do individuals or religious organizations;<sup>63</sup>
- The precatory nature of shareholder proposals results in only certain types of proposals effecting actual change, regardless of the outcome of a shareholder vote;<sup>64</sup> and
- Stock ownership by “insiders” (e.g., corporate management and directors) reduces support for shareholder proposals.<sup>65</sup>

There is relatively little scholarship that focuses on social policy shareholder resolutions. In 1999, N.K. Chidambaran and Tracie Woitke found “that a larger percentage of social issue proposals is withdrawn compared to corporate governance proposals.”<sup>66</sup> In 2006, Paula Tkac analyzed social policy resolutions filed between 1999 and 2002 and concluded that withdrawal of a resolution generally indicates negotiation with management, finding that “almost 80 percent [of withdrawn proposals] resulted in a concrete corporate response.”<sup>67</sup> In 2012, Miguel Rojas identified factors that typically increase the chances of withdrawal—for example, (1) certain issues, such as equal employment, tend to result in negotiated settlement and (2) the percentage of votes received by a resolution in the prior year is positively correlated to the likelihood of withdrawal.<sup>68</sup>

Despite Rojas’s findings on equal employment proposals generally, there has been little academic research on the use of shareholder proposals to

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significant shareholder support, and social responsibility proposals, where the connection to firm value is more tenuous and which attract low levels of shareholder approval.” (citation omitted)).

<sup>63</sup> See, e.g., Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. FIN. ECON. 275, 285, 288 (2000) (“On average, proposals sponsored by institutional or coordinated investors receive over 175% as many votes as those sponsored by individuals.”).

<sup>64</sup> E.g., Thomas & Cotter, *supra* note 62, at 371.

<sup>65</sup> See, e.g., Romano, *supra* note 62, at 185 (“[T]he percentage of votes cast for shareholder proposals is negatively related to insider ownership and positively related to institutional ownership.”).

<sup>66</sup> N.K. Chidambaran & Tracie Woitke, *The Role of Negotiations in Corporate Governance: Evidence from Withdrawn Shareholder-Initiated Proposals* 7-8 (NYU Ctr. for Law & Bus., Working Paper No. CLB-99-012, 1999).

<sup>67</sup> Paula Tkac, *One Proxy at a Time: Pursuing Social Change Through Shareholder Proposals*, FED. RES. BANK ATLANTA ECON. REV., Third Quarter 2006, at 18-19.

<sup>68</sup> See Miguel Rojas et al., *What Explains a Negotiated Outcome for Social Policy Shareholder Resolutions?*, MGMT. REV.: INT’L J., Summer 2012, at 17, 37-39 (showing positive and significant correlations to withdrawal for some, but not all, resolutions addressing social policy issues, and resolutions that received broad shareholder support in the past year).

implement nondiscrimination policies that include sexual orientation and gender identity. Existing research has not quantified the efficacy of shareholder proposals seeking LGBT-inclusive EEO policies, but rather has focused on specific areas of discrimination, such as employee benefits. For example, examining case studies of LGBT-inclusive proposals, Nicole Raeburn notes that shareholder proposals on such nondiscrimination measures as domestic partner-benefits policies can create tangible policy changes even without a shareholder vote.<sup>69</sup> On the other hand, Danielle Dale, focusing solely on the ability of shareholder proposals to initiate a shareholder vote on an issue, concludes that the proposals “lack any real teeth in regards to amending corporate employment discrimination policies.”<sup>70</sup>

This Comment contributes to the existing literature by evaluating the content and outcome of shareholder proposals that seek to add, remove, or modify LGBT nondiscrimination policies.<sup>71</sup> Additionally, it analyzes shareholder proponents’ and boards of directors’ arguments for or against implementing such proposals.<sup>72</sup> Lastly, it examines the SEC’s response to no-action letter requests concerning these proposals and shows that the SEC has made extensive value judgments on LGBT-exclusive resolutions through a line-editing approach that is unique among social policy shareholder proposals.<sup>73</sup> This Comment concludes that shareholder proposals have been essential in securing workplace protections for members of the LGBT community, particularly in lieu of comprehensive statutory protections.

This Comment is consistent with prior literature on social policy shareholder resolutions, which suggests that withdrawal of a resolution generally indicates a successful settlement and a “concrete corporate response.”<sup>74</sup> However, this Comment goes further in analyzing outcomes by tracking the ultimate success of proposals that are not initially adopted. This is important considering that, though thirty percent of LGBT-inclusive resolutions are initially unsuccessful, sixty-four percent of those failed resolutions

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<sup>69</sup> NICOLE C. RAEBURN, CHANGING CORPORATE AMERICA FROM INSIDE OUT: LESBIAN AND GAY WORKPLACE RIGHTS 132 (2004) (“Employee activists have a far greater chance of winning equitable policies when their companies are subject to gay-inclusive nondiscrimination statutes, boycotts, lawsuits, or shareholder action.”).

<sup>70</sup> Danielle R. Dale, Note, *Gender Identity Protection: The Inadequacy of Shareholder Action to Amend Corporate Employment Discrimination Policies*, 36 IOWA J. CORP. L. 469, 492 (2011).

<sup>71</sup> See *infra* Part III.

<sup>72</sup> See *infra* Part IV.

<sup>73</sup> *Id.*

<sup>74</sup> Tkac, *supra* note 67 and accompanying text; see also Rojas et al., *supra* note 68, at 21-22 (“[W]e saw the initiation of a shareholder proposal as being part of an ongoing process of negotiations between shareholders and management. Only when an agreement cannot be reached by the parties, is the proposal put to a vote.”).

are ultimately adopted.<sup>75</sup> This suggests the importance of sustained shareholder advocacy at effecting change. Sustained negotiations between shareholders and companies as well as publicity raised by shareholder proposals could contribute to their success. This Comment also describes the SEC's current stance toward employment-based shareholder proposals. In contrast to the *Cracker Barrel* Standard employed twenty years ago, which rendered virtually all employment-based proposals excludable under the "ordinary business operations exclusion,"<sup>76</sup> such proposals concerning nondiscrimination policies are now rarely excluded.<sup>77</sup> Today, the ordinary business operations exclusion is generally triggered only for LGBT-inclusive proposals that espouse broad concepts of nondiscrimination touching such areas as marketing and corporate strategy.<sup>78</sup> Attempts to exclude LGBT-exclusive proposals have also been rebuffed by the SEC, primarily through line-editing. This may reflect a baseline position that nondiscrimination proposals are *prima facie* includable in companies' proxy materials, but that proxy materials should not be a platform for voicing broad, inflammatory social and political judgments. Whether a statement is too inflammatory to be included is a case-by-case value judgment without a clear, objective standard.

### III. LGBT-NONDISCRIMINATION-POLICY SHAREHOLDER PROPOSALS, 2005–2012

#### A. Methodology and Overview of Sample

To explore shareholder proposals that seek to add or remove sexual orientation or gender identity from companies' nondiscrimination policies, data were compiled from multiple sources to analyze (1) shareholder proposals from 2005–2012 and (2) SEC no-action letters from 2000–2012.

For the purposes of this Comment, shareholder resolutions that seek to add sexual orientation, gender identity, or both to a company's nondiscrimination policy are described as "LGBT-inclusive." Shareholder resolutions that seek to remove sexual orientation or gender identity from a company's nondiscrimination policy are described as "LGBT-exclusive." The terms "nondiscrimination policies" and "equal employment opportunity . . . policies" are used interchangeably.

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<sup>75</sup> See *infra* Tables 6 & 7.

<sup>76</sup> Roy, *supra* note 5, at 1524.

<sup>77</sup> See generally *infra* Tables 10 & 13.

<sup>78</sup> See Roy, *supra* note 5, at 1513–14, 1526–27.

### 1. Sources of Shareholder Resolutions

A database of 248 LGBT-inclusive and LGBT-exclusive shareholder proposals, filed between 2005 and 2012, was created using the following resources:

- **SEC EDGAR System:** The SEC's EDGAR system collects and maintains forms and documents disclosed by public companies and permits a full-text search for items disclosed during the past four years.<sup>79</sup> Schedule 14A filings and SEC no-action letters were searched using the terms "sexual orientation" and "gender identity" to find pertinent shareholder proposals. Filings were individually examined to ensure relevance to this study. The EDGAR system compiles only shareholder proposals that are publicly filed by the company—for example, proposals that were withdrawn by the shareholder prior to disclosure in a Schedule 14A filing—necessitating the use of voluntary shareholder disclosure to fill in the gaps.
- **Proxy Preview:** Proxy Preview is an annual report published by As You Sow, an organization that "promotes environmental and social corporate responsibility."<sup>80</sup> The report provides an overview of environmental and social shareholder resolutions filed in anticipation of the proxy season.<sup>81</sup> Proxy Preview reports published in the years between 2005 and 2012 were used to populate the study's shareholder resolution database.<sup>82</sup> The reports provide information about the shareholder proponent, the company, the proposal's content, and meeting date or status of the proposal (e.g., withdrawn, passed).<sup>83</sup>

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<sup>79</sup> *Search the Next-Generation EDGAR System*, U.S. SEC. AND EXCHANGE COMMISSION, <http://www.sec.gov/edgar/searchedgar/webusers.htm> (last visited Feb. 21, 2014).

<sup>80</sup> *About As You Sow*, AS YOU SOW, <http://www.asyousow.org/about> (last visited Feb. 21, 2014).

<sup>81</sup> PROXY PREVIEW, <http://www.proxypreview.org> (last visited Feb. 21, 2014); *see also* HEIDI WELSH & MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2012, at 2-5, [http://asyousow.org/publications/2012/ProxyPreview2012\\_20120319.pdf](http://asyousow.org/publications/2012/ProxyPreview2012_20120319.pdf) [hereinafter PROXY PREVIEW 2012].

<sup>82</sup> PROXY PREVIEW 2012, *supra* note 81; HEIDI WELSH & MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2011, [http://www.asyousow.org/publications/ProxyPreview\\_2011.pdf](http://www.asyousow.org/publications/ProxyPreview_2011.pdf); MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2010, <http://www.asyousow.org/publications/2010%20articles/ProxyPreview2010.pdf>; HEIDI WELSH & MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2009, [http://www.asyousow.org/publications/ProxyPreview\\_2009.pdf](http://www.asyousow.org/publications/ProxyPreview_2009.pdf); HEIDI WELSH & MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2008, <http://www.asyousow.org/publications/proxy-preview-2008.pdf>; MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2007, [http://www.asyousow.org/publications/2007\\_proxy\\_preview.pdf](http://www.asyousow.org/publications/2007_proxy_preview.pdf); MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2006, [http://www.asyousow.org/publications/2006\\_proxy\\_preview.pdf](http://www.asyousow.org/publications/2006_proxy_preview.pdf); MICHAEL PASSOFF, AS YOU SOW, PROXY PREVIEW 2005, [http://www.asyousow.org/publications/2005\\_proxy\\_preview.pdf](http://www.asyousow.org/publications/2005_proxy_preview.pdf).

<sup>83</sup> *See, e.g.*, PROXY PREVIEW 2012, *supra* note 81, at 27 tbl.



- **Shareholder-Proponent Publications:** Information about shareholder resolutions was also compiled from the websites and publications of the following shareholder-proponents of resolutions for LGBT-inclusive EEO policies<sup>84</sup>: Calvert Investments,<sup>85</sup> the New York City Pension Funds,<sup>86</sup> Pride Foundation,<sup>87</sup> Trillium Asset Management,<sup>88</sup> the Unitarian Universalist Association of Congregations,<sup>89</sup> and Walden Asset Management.<sup>90</sup>

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<sup>84</sup> There may be selection bias to the extent that shareholder proponents who report their activism activities (and are thus included in the data used in this report) have different results than other shareholder proponents. For example, individual shareholders may be underrepresented in this dataset, and may have a weaker capacity to influence change with shareholder proposals than institutional shareholders.

<sup>85</sup> *Sustainable and Responsible Investing: Calvert's Shareholder Resolutions: Historical Record*, CALVERT INVESTMENTS, <http://www.calvert.com/sri-resolutions-history.html> (last visited Feb. 21, 2014).

<sup>86</sup> NEW YORK CITY COMPTROLLER, 2012 SHAREOWNER INITIATIVES OF THE NEW YORK CITY PENSION FUNDS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2012-Shareholder-Report.pdf> [hereinafter 2012 NYC PENSION FUND POSTSEASON REPORT]; NEW YORK CITY COMPTROLLER, 2011 SHAREOWNER INITIATIVES OF THE NEW YORK CITY PENSION FUNDS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2011-Shareholder-Report.pdf> [hereinafter 2011 NYC PENSION FUND POSTSEASON REPORT]; COMPTROLLER OF THE CITY OF NEW YORK, THE 2010 SHAREHOLDER PROPOSAL PROGRAMS OF THE NEW YORK CITY PENSION FUNDS & RETIREMENT SYSTEMS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2010-Shareholder-report.pdf> [hereinafter 2010 NYC PENSION FUND POSTSEASON REPORT]; NEW YORK CITY COMPTROLLER, THE 2009 SHAREHOLDER PROPOSAL PROGRAMS OF THE NEW YORK CITY PENSION FUNDS & RETIREMENT SYSTEMS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2009-Shareholder-report.pdf> [hereinafter 2009 NYC PENSION FUND POSTSEASON REPORT]; NEW YORK CITY COMPTROLLER, THE 2008 SHAREHOLDER PROPOSAL PROGRAMS OF THE NEW YORK CITY PENSION FUNDS & RETIREMENT SYSTEMS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2008-Shareholder-report.pdf> [hereinafter 2008 NYC PENSION FUND POSTSEASON REPORT]; NEW YORK CITY COMPTROLLER, POSTSEASON REPORT: 2007 SHAREHOLDER PROPOSAL PROGRAMS & OTHER SHAREOWNERSHIP INITIATIVES OF THE NEW YORK CITY PENSION FUNDS & RETIREMENT SYSTEMS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2007-Shareholder-report.pdf> [hereinafter 2007 NYC PENSION FUND POSTSEASON REPORT]; NEW YORK CITY COMPTROLLER, THE NEW YORK CITY PENSION FUNDS' 2006 SHAREHOLDER PROPOSALS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2006-shareholder-report.pdf> [hereinafter 2006 NYC PENSION FUND POSTSEASON REPORT]; NEW YORK CITY COMPTROLLER, 2005 PROXY INITIATIVES OF THE NEW YORK CITY PENSION FUNDS, *available at* <http://www.comptroller.nyc.gov/wp-content/uploads/documents/2005-shareholder-report.pdf> [hereinafter 2005 NYC PENSION FUND POSTSEASON REPORT].

<sup>87</sup> *Shareholder Advocacy*, PRIDE FOUND., <http://www.pridefoundation.org/what-we-do/initiatives/shareholder-activism> (last visited Feb. 21, 2014).

<sup>88</sup> *2011 Resolutions at a Glance*, TRILLIUM ASSET MGMT., <http://www.trilliuminvest.com/uncategorized/2011-resolutions-at-a-glance> (last visited Feb. 21, 2014); *Trillium's 2010 Shareholder Resolutions At-A-Glance*, TRILLIUM ASSET MGMT., <http://www.trilliuminvest.com/news-articles-category/advocacy-news-articles/2010-shareholder-resolutions-at-a-glance> (last visited Feb. 21, 2014); *2009 Shareholder Advocacy At-A-Glance*, TRILLIUM ASSET MGMT., <http://www.trilliuminvest.com/>

## 2. Attributes of Shareholder Resolutions

Data on the shareholder resolutions and the companies for which they were filed were compiled from: Schedule 14A filings, Form 8-K and Form 10-Q filings, the Hoovers database,<sup>91</sup> company websites, the Human Rights Campaign (HRC) Equality Index,<sup>92</sup> and news articles.

Table 4: Attributes of Shareholder Resolutions and Sources

Attribute	Source(s)
Proxy season year	Schedule 14A Filings
Content of proposal (LGBT exclusive versus LGBT inclusive)	Schedule 14A Filings
Protections advocated for in shareholder proposal (sexual orientation only, gender identity only, both sexual orientation and gender identity)	Schedule 14A Filings
Arguments in favor of resolution by the shareholder proponent	Schedule 14A Filings
Arguments in favor against resolution by the board of directors	Schedule 14A Filings
Name of shareholder proponent	Schedule 14A Filings
Results of shareholder votes (percentage of votes in favor of the resolution and whether the resolution passed)	Form 8-K and 10-Q Filings
Year that sexual orientation or gender identity protections were implemented	Company websites, HRC Equality Index, News articles

## 3. SEC No-Action Letters

In addition, SEC no-action letters issued between 2000 and 2012 regarding requests by companies to omit LGBT-inclusive or LGBT-exclusive shareholder resolutions from proxy materials were collected and examined. These no-action letters generally contain the entire correspondence among the shareholder proponent, the company, and the SEC regarding the omission of the shareholder resolution, as well as the final decision by the SEC and the statutory basis for that decision.

news-articles-category/advocacy-news-articles/2009-shareholder-advocacy-at-a-glance (last visited Feb. 21, 2014).

<sup>89</sup> *Shareholder Advocacy*, UNITARIAN UNIVERSALIST ASS'N OF CONGREGATIONS, <http://www.uua.org/finance/investment/sri/shareholderadvocacy/index.shtml> (last visited Feb. 21, 2014).

<sup>90</sup> *Shareholder Resolution History*, WALDEN ASSET MGMT., [http://www.waldenassetmgmt.com/investing-for-Change/shareholder\\_resolution\\_history](http://www.waldenassetmgmt.com/investing-for-Change/shareholder_resolution_history) (last visited Feb. 21, 2014).

<sup>91</sup> HOOVERS, <http://www.hoovers.com/> (last visited Feb. 21, 2014).

<sup>92</sup> *See, e.g.*, HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 30.

## B. Analysis of Shareholder Proposals

### 1. Proponents of Shareholder Resolutions

In 2012, the primary filers of social and environmental resolutions were pension funds (27%), socially responsible investors (SRIs) (27%), faith-based institutions (11%), special interest groups (10%), individuals (9%), unions (8%), and foundations (4%).<sup>93</sup> As discussed below, whereas LGBT-inclusive proposals come from a variety of the groups listed above, LGBT-exclusive proposals come only from individual shareholders.

#### a. Shareholder Proponents of LGBT-Inclusive Resolutions

The New York City Common Retirement Fund (the “Fund”) is the leading pension fund filer, if not the leading filer of LGBT-inclusive resolutions.<sup>94</sup> The Fund “filed the first shareholder proposal addressing sexual orientation discrimination at Cracker Barrel”<sup>95</sup> and as the “lead proponent of a filing group,” submitted resolutions at Exxon Mobil advocating for sexual orientation and gender identity protection.<sup>96</sup>

The following SRIs have been most active in filing LGBT-inclusive resolutions: Walden Asset Management, Calvert Investments, and Trillium Asset Management.<sup>97</sup> These investors generally adopt a multipronged approach to sustainable and responsible investing, incorporating the company’s stances on social issues into their investment criteria, leveraging their stock ownership to engage in dialogue with companies and file shareholder resolutions, and exercising their clients’ positions on social issues through proxy voting.<sup>98</sup>

Institutional shareholders with large holdings in a company, such as pension funds and SRIs, often have the greatest ability to effect policy change in the company. According to Shelley Alpern, Assistant Vice President of

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<sup>93</sup> PROXY PREVIEW 2012, *supra* note 81, at 6.

<sup>94</sup> See 2012 NYC PENSION FUND POSTSEASON REPORT, *supra* note 86, at 6. The New York City Comptroller oversees the Fund, which consists of five New York City pension funds—the New York City Board of Education Retirement System, the New York City Employees’ Retirement System, the New York City Fire Department Pension Fund, the New York City Police Pension Fund, and the New York City Teachers’ Retirement System. *Id.* at 1. As of May 2012, the value of the portfolio was roughly \$150.3 billion. Lila Shapiro, *Thomas DiNapoli, N.Y. Comptroller, Pushes Expanded Protections for LGBT Workers at ExxonMobil*, HUFFPOST: GAY VOICES, [http://www.huffingtonpost.com/2012/05/24/thomas-dinapoli-exxonmobil-lgbt\\_n\\_1543783.html](http://www.huffingtonpost.com/2012/05/24/thomas-dinapoli-exxonmobil-lgbt_n_1543783.html) (last updated May 25, 2012, 2:23 PM).

<sup>95</sup> PROXY PREVIEW 2011, *supra* note 82, at 18.

<sup>96</sup> Exxon Mobil Corp., Definitive Proxy Statement (Schedule 14A), at 67 (Apr. 12, 2012).

<sup>97</sup> See PROXY PREVIEW 2012, *supra* note 81, at 6.

<sup>98</sup> See, e.g., *Shareholder Engagement*, WALDEN ASSET MGMT., <http://www.waldenassetmgmt.com/Investing-for-Change/shareholder-engagement> (last visited Feb. 21, 2014).

Trillium Asset Management, “The advantage of having an institutional holder file these resolutions is that companies always return their phone calls. If they want dialogue, they get it.”<sup>99</sup> Noninstitutional shareholders (e.g., the Pride Foundation, an LGBT philanthropic foundation, and the Unitarian Universalist Association of Congregations, a faith-based institution) have also been active in filing LGBT-inclusive resolutions.<sup>100</sup>

b. *Shareholder Proponents of LGBT-Exclusive Resolutions*

In contrast to the organized shareholder activism surrounding LGBT-inclusive resolutions discussed in the previous subsection, LGBT-exclusive resolutions are often filed by individuals who tend to have a small stock ownership in the company.<sup>101</sup> Though these shareholder proponents may meet the minimum stock ownership necessary to file a shareholder resolution, they often lack the leverage necessary to engage the company’s officers and directors in meaningful dialogue to amend their policies.

2. Content of Proposals

The vast majority of shareholder resolutions to add or remove LGBT categories from a company’s EEO policy are LGBT-inclusive resolutions.<sup>102</sup> Though prior to 2008, the majority of LGBT-inclusive resolutions advocated for adding only sexual orientation to a company’s EEO policy, most of the recently filed shareholder resolutions have sought protections either for only gender identity (for companies that already have sexual orientation protection) or for both sexual orientation and gender identity.<sup>103</sup> This likely reflects changing social mores about transgender rights; LGBT political changes, which began in the 1990s and led toward more inclusion of

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<sup>99</sup> Sulkowski & Greenfield, *supra* note 38, at 938.

<sup>100</sup> See PROXY PREVIEW 2012, *supra* note 81, at 27 tbl. (chronicling diversity proposals and their proponents).

<sup>101</sup> Compare AmSouth Bancorp., Definitive Proxy Statement (Schedule 14A), at 37-38 (Mar. 16, 2006) (stating that the shareholder proponent of an LGBT-inclusive resolution, Walden Asset Management, owned 606,797 shares of AmSouth Bancorporation stock), with Am. Express Co., Definitive Proxy Statement (Schedule 14A), at 18 (Mar. 22, 2006) (noting that the shareholder proponent of an LGBT-exclusive resolution, Mr. Thomas Strobhar, owned fifty shares of American Express Co. stock).

<sup>102</sup> See *infra* Table 5 (demonstrating that only 11 LGBT-exclusive resolutions were filed between 2005 and 2012, compared to 237 LGBT-inclusive resolutions).

<sup>103</sup> See *id.* (exhibiting a drastic increase in sexual orientation and gender identity LGBT-inclusive resolutions beginning in 2008 and a concurrent drop in sexual orientation-only LGBT-inclusive resolutions, which dropped to zero after 2009).

transgender individuals;<sup>104</sup> and the seemingly minimal impact that gender identity inclusion in shareholder resolutions has on ultimate voting results.<sup>105</sup>

Between 2005 and 2012, there were 248 LGBT-exclusive and LGBT-inclusive shareholder resolutions filed—11 LGBT-exclusive resolutions and 237 LGBT-inclusive resolutions.<sup>106</sup> This amounts to, on average, slightly more than one LGBT-exclusive resolution per year (with a peak of 5 such resolutions in 2006) compared to just over 29 LGBT-inclusive resolutions per year (with a peak of 40 such resolutions in 2009).<sup>107</sup> These resolutions were submitted to a total of 186 companies between 2005 and 2012: 177 companies received LGBT-inclusive resolutions and 9 companies received LGBT-exclusive resolutions.<sup>108</sup>

Of the 237 shareholder resolutions in favor of LGBT-inclusive EEO policies, 59 (25%) sought only sexual orientation protection, 41 (17%) sought only gender identity protection, and 137 (58%) sought both.<sup>109</sup> Resolutions advocating for protections of only sexual orientation dropped precipitously in 2008, in favor of resolutions concerning both sexual orientation and gender identity.<sup>110</sup> For example, in 2005, 22 of 26 LGBT-inclusive resolutions advocated for only sexual orientation protections, while in 2012, 25 of 29 LGBT-inclusive resolutions sought both sexual orientation and gender identity protections.<sup>111</sup>

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<sup>104</sup> See, e.g., Amy L. Stone, *More Than Adding a T: American Lesbian and Gay Activists' Attitudes Towards Transgender Inclusion*, 12 *SEXUALITIES* 334, 335-336 (2009) ("Although gender variant individuals have always participated in the LGBT movement, there was a consolidation of transgender inclusion in the American LGBT movement in the mid-1990s." (citation omitted)).

<sup>105</sup> See *infra* Table 8 (displaying an average vote for LGBT-inclusive resolutions of 29.6% (sexual orientation only), 24.2% (gender identity only), and 31.6% (sexual orientation and gender identity)).

<sup>106</sup> *Infra* Table 5. There is no way to determine the total number of shareholder resolutions that were actually filed, because the data relies on self-disclosure by companies or shareholder proponents. The total number of resolutions I include is thus constrained.

<sup>107</sup> *Id.*

<sup>108</sup> Database of shareholder resolutions on file with author.

<sup>109</sup> *Infra* Table 5.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

Table 5: Shareholder Resolutions, 2005–2012, by Content: LGBT-Inclusive Versus LGBT-Exclusive, Sexual Orientation or Gender Identity<sup>112</sup>

Proxy Season	LGBT-Exclusive Resolutions	LGBT-Inclusive Resolutions			Total Inclusive Resolutions
		Sexual Orientation	Gender Identity	Both	
2005	1	22	1	3	26
2006	5	19	0	6	25
2007	2	12	2	10	24
2008	1	5	3	27	35
2009	0	1	13	26	40
2010	0	0	9	20	29
2011	1	0	9	20	29
2012	1	0	4	25	29
Total 2005–2012	11	59	41	137	237
Average 2005–2012	1.375	7.375	5.125	17.0	29.5

### 3. Outcomes of Shareholder Resolutions

This subsection argues that while LGBT-inclusive shareholder resolutions tend to fail when brought to a shareholder vote, they are generally successful in motivating companies to reform their EEO policies.<sup>113</sup> A majority of companies where an LGBT-inclusive shareholder resolution fails ultimately adopt the employment protections originally requested by these resolutions.<sup>114</sup> Of the LGBT-exclusive resolutions for which the outcome of the resolution was determined, they uniformly failed to effect removal of a company's LGBT protections.<sup>115</sup>

Table 6 demonstrates the outcomes of LGBT-inclusive and LGBT-exclusive shareholder resolutions. Of LGBT-inclusive resolutions, 59% of proposals resulted in LGBT-inclusive changes to company policy, even when the proposals did not actually pass at the shareholder level.<sup>116</sup> The most common outcome was that the resolutions were withdrawn (51%).<sup>117</sup> Shareholders less frequently voted to pass resolutions in their entirety (2%), or the resolutions seeking both sexual orientation and gender identity protection were withdrawn, with the company subsequently adopting only sexual orientation protection (5%).<sup>118</sup> Of all LGBT-inclusive resolutions,

<sup>112</sup> Database of shareholder resolutions on file with author.

<sup>113</sup> See *infra* Table 7 (indicating that 64% of corporations that rejected LGBT-inclusive shareholder resolutions later adopted their own LGBT-inclusive employment policies).

<sup>114</sup> See *id.*

<sup>115</sup> See *infra* Table 6.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

30% were not adopted by the company, with a failed shareholder vote cited as the most common reason (27%).<sup>119</sup> Much of the remaining LGBT-inclusive resolutions are those that were withdrawn because the company already had an EEO policy in place that contained the protections the resolution sought (5% of LGBT-inclusive resolutions).<sup>120</sup>

By examining shareholder proponents' press releases, I found that 78% of the withdrawals of LGBT-inclusive proposals were a result of negotiated settlements with shareholders. Note that this figure is likely higher, as shareholder proponents may not have publicized every successful advocacy campaign.<sup>121</sup> This figure is also consistent with the work of Paula Tkac, who found that concrete corporate responses followed the withdrawal of 79% of the social policy proposals in her sample.<sup>122</sup> The strategies the shareholder proponents employ may determine whether the company is likely to adopt their desired policy change following the withdrawal of their proposals. While some proponents withdraw their proposal if the company simply opens lines of communication, many proponents of LGBT-inclusive proposals frequently take an "all-or-nothing" approach, withdrawing their proposals "only if the company agrees" to implement the resolution "in full."<sup>123</sup>

Of resolutions for LGBT-exclusive EEO Policies, 73% failed by shareholder vote.<sup>124</sup> The remaining resolutions were not put to a vote, and thus I was unable to determine the exact outcome of these resolutions.

These statistics are consistent with Rojas's research comparing the outcomes of U.S. social policy proposals between 2000 and 2004. Rojas found the following outcomes for proposals addressing equal employment: 37.2% were voted on by shareholders, 53.8% were withdrawn, 6.9% were omitted, and 2.1% were not presented.<sup>125</sup> According to Rojas's research, the overall withdrawal rate among social policy proposals during this period was 27.7%, meaning that, at 53.8%, equal employment proposals were withdrawn with far greater frequency than other social policy proposals.<sup>126</sup> Correspondingly, the rates at which equal employment proposals were voted on by shareholders or omitted were lower than the average: 6.9% of equal employment proposals

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Tkac, *supra* note 67, at 17 (noting that "proponents [tend] to trumpet successes and hide failures").

<sup>122</sup> *Id.* at 417.

<sup>123</sup> CAROLYN MATHIASSEN, INSTITUTIONAL SHAREHOLDER SERVICES, 2013 PROXY SEASON PREVIEW: ENVIRONMENTAL & SOCIAL ISSUES (2012), available at <http://www.issgovernance.com/files/private/2013ISSPreviewES.pdf>.

<sup>124</sup> See *infra* Table 6.

<sup>125</sup> Rojas et al., *supra* note 68, at 32 tbl.1.

<sup>126</sup> *Id.*

were omitted versus an overall average of 15.2%, and 37.2% of equal employment proposals were voted on compared to an overall average of 54.3%.<sup>127</sup> These findings are also consistent with Tkac's research using social policy proposals gathered between 1992 and 2002, which found that anti-discrimination proposals were the most likely to be withdrawn among social policy proposals.<sup>128</sup>

The higher withdrawal rate for equal employment proposals is indicative of these proposals' success, due perhaps to the more active engagement of institutional shareholders on this issue, changing social attitudes around LGBT workplace rights, and pressure to conform to the practices of peer companies. Equal employment proposals do not often appear on corporate ballots, likely indicating that their proponents are generally successful at negotiating settlements with companies. Further, this type of proposal's lower rate of omission likely reflects the SEC's current stance—generally including proposals for nondiscrimination policies, as discussed further in Part IV.

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<sup>127</sup> *Id.*

<sup>128</sup> See Tkac, *supra* note 67, at 18 ("Antidiscrimination proposals are the most effective or successful. Roughly half of all these proposals are withdrawn likely because they often call for a relatively low-cost response, such as a statement of nondiscrimination policy or a release of information regarding EEOC practices . . .").



**Table 6: Outcomes of LGBT-Inclusive Resolutions  
Versus LGBT-Exclusive Resolutions<sup>129</sup>**

Outcome	LGBT-Inclusive Resolutions	LGBT-Exclusive Resolutions
Success	139 (59%)	0 (0%)
Majority Vote	5 (2%)	0 (0%)
Withdrawn	121 (51%)	0 (0%)
Adopted Without Gender Identity Protections <sup>130</sup>	13 (5%)	0 (0%)
Failure	70 (30%)	8 (73%)
Failed by Vote	64 (27%)	8 (73%)
SEC Permits Omission from Proxy Materials <sup>131</sup>	5 (2%)	0 (0%)
Procedural Challenge	1 (.4%)	0 (0%)
Other	28 (12%)	3 (27%)
Existing Policy <sup>132</sup>	12 (5%)	0 (0%)
Other	1 (7%)	3 <sup>133</sup> (27%)
Total, 2005–2012	237	11

However, the 30% failure rate of these resolutions is misleading when viewed in isolation. Rather, one must look to the LGBT-inclusive EEO policy in companies where these resolutions were filed to better analyze the effectiveness of such advocacy. Of the 33 companies where LGBT-inclusive resolutions failed at the shareholder level, 21 (64%) subsequently adopted

<sup>129</sup> Database of shareholder resolutions on file with author.

<sup>130</sup> These resolutions seek to add both sexual orientation and gender identity to a company's EEO policy. They were withdrawn in exchange for the company's agreement to add sexual orientation to their policy. *See, e.g.*, 2010 NYC PENSION FUND POSTSEASON REPORT, *supra* note 86, at 15 (explaining that the Fund withdrew its resolution for EEO policies addressing both sexual orientation and gender identity at Chesapeake Energy Corporation after the company included sexual orientation protection and agreed "to continue dialogue on gender identity" protection).

<sup>131</sup> The company omitted these resolutions because the SEC, after evaluating the arguments of both the company and the shareholder proponent, determined it would not take action if the company omitted the resolution from its proxy materials. *See, e.g.*, Commercial Metals Co., SEC No-Action Letter, 2009 WL 3252421, at \*1 (Nov. 5, 2009) (stating that the Office of Chief Counsel of the SEC's Division of Corporation Finance "will not recommend enforcement action to the Commission if CMC omits the proposal from its proxy materials in reliance on rule 14a-8(i)(10)").

<sup>132</sup> The shareholder proponent withdrew these resolutions because the company had a preexisting EEO policy that satisfied the proposal's requests. *See, e.g.*, 2006 NYC PENSION FUND POSTSEASON REPORT, *supra* note 86, at 13 (describing how LGBT-inclusive shareholder resolutions were withdrawn at Convergys Corporation, Computer Sciences Corporation, and Fortune Brands because the companies verified preexisting policies that addressed the shareholder proponent's recommendations).

<sup>133</sup> These three proposals were not subject to a vote for unknown reasons.

such policies and only 11 (33%) did not.<sup>134</sup> Of the 21 companies that adopted LGBT-inclusive EEO policies, 10 did so as a result of shareholder action—9 in response to another shareholder resolution and 1 in direct response to a shareholder vote.<sup>135</sup> Of course, these findings must be viewed within the context discussed earlier, that most—but not all—of the sample’s withdrawn social policy resolutions have resulted in concrete corporate change.

Table 7: Outcome at Companies Where an LGBT-Inclusive EEO Policy Was Brought to a Vote and Failed or Was Omitted in Accordance with an SEC No-Action Letter<sup>136</sup>

Outcome	Number of Companies
Proposal Resubmitted in Later Year, Withdrawn Because Company Adopted LGBT-Inclusive EEO Policy	9 (27%)
Proposal Resubmitted in Later Year, Brought to Vote and Passed	1 (3%)
Company Adopted LGBT-Inclusive EEO Policy, Not Necessarily in Response to Shareholder Proposal <sup>137</sup>	11 (33%)
Company Has Not Adopted LGBT-Inclusive EEO Policy as of Publication	11 (33%)
Other	1 (3%) <sup>138</sup>
Total, 2005—2012	33

#### 4. Voting Statistics for Shareholder Proposals

Though both LGBT-inclusive and LGBT-exclusive resolutions generally fail when put to a vote,<sup>139</sup> the results of the votes are nonetheless revealing about shareholders’ attitudes toward such resolutions and how their acceptance for such resolutions has grown over time. Two findings underscore this increased shareholder acceptance. First, the average vote for LGBT-inclusive shareholder resolutions has increased slightly over time.<sup>140</sup> Second, among companies where LGBT-inclusive resolutions were put to a vote

<sup>134</sup> See *infra* Table 7.

<sup>135</sup> *Id.*

<sup>136</sup> Database of shareholder resolutions on file with author.

<sup>137</sup> Though these eleven companies have adopted *an* LGBT-inclusive EEO policy, to date, they have not implemented the specific employment protections the proposals requested.

<sup>138</sup> This company was later acquired.

<sup>139</sup> See *supra* Table 6 (showing that sixty-four of the sixty-nine LGBT-inclusive resolutions subject to a shareholder vote between 2005 and 2012 failed to garner a majority).

<sup>140</sup> See *infra* Table 9 and text accompanying note 155.

more than once, most resolutions garnered more shareholder support in the second round.<sup>141</sup>

LGBT-inclusive resolutions filed and voted on between 2005 and 2012 garnered an average of only 30% shareholder support.<sup>142</sup> Shareholder support was slightly stronger for resolutions that advocated for both sexual orientation and gender identity protections than for those that advocated for protections for only sexual orientation or only gender identity.<sup>143</sup> LGBT-exclusive resolutions subject to a vote have resulted in an extraordinarily low percentage of shareholder support—an average of 3.3%.<sup>144</sup>

**Table 8: Average Percentage Vote in Favor of Shareholder Resolutions, 2005–2012: LGBT-Exclusive Versus LGBT-Inclusive<sup>145</sup>**

	LGBT-Exclusive Resolutions	LGBT-Inclusive Resolutions			
		Sexual Orientation	Gender Identity	Both	Total Inclusive Resolutions
Average Vote in Favor of Resolution <sup>146</sup>	3.3%	29.6%	24.2%	31.6%	30.0%
Minimum	1.8% <sup>147</sup>	1.6% <sup>148</sup>	6.3% <sup>149</sup>	2.3% <sup>150</sup>	1.6%
Maximum	6.1% <sup>151</sup>	52.3% <sup>152</sup>	43.2% <sup>153</sup>	61.7% <sup>154</sup>	61.7%
Number of Resolutions	8	14	11	44	69

<sup>141</sup> See *infra* text accompanying notes 163–66.

<sup>142</sup> See *infra* Table 8.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Database of shareholder resolutions on file with author.

<sup>146</sup> This figure is calculated by dividing the number of shareholder votes in favor of the resolution by the total number of votes on the resolution, discounting abstentions. Even some resolutions that yielded greater than 50% of the vote by this calculation failed because the law of the state of incorporation requires that abstentions be considered votes against the resolution. See, e.g., HCC Insurance Holdings, Inc., Quarterly Report (Form 10-Q), at 35 (Aug. 9, 2007) (“For the proposal to pass under Delaware law, the shares in favor must exceed 50% of the total shares present at the meeting, in person or by proxy, and entitled to vote . . .”).

<sup>147</sup> See JPMorgan Chase & Co., Current Report (Form 8-K) (May 18, 2006).

<sup>148</sup> EchoStar Commc'ns, Corp., Annual Report (Form 10-K), at 42 (Aug. 15, 2005).

<sup>149</sup> See Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q), at 28 (Sept. 4, 2008).

<sup>150</sup> DISH Network Corp., Quarterly Report (Form 10-Q), at 61 (Aug. 4, 2008).

<sup>151</sup> See Wells Fargo & Co., Quarterly Report (Form 10-Q), at 84 (Aug. 8, 2008).

<sup>152</sup> See Expeditors Int'l of Wash., Inc., Quarterly Report (Form 10-Q), at 19 (Aug. 8, 2008).

<sup>153</sup> See Anadarko Petroleum Corp., Current Report (Form 8-K), at 3 (May 21, 2012).

<sup>154</sup> See KBR, Inc., Current Report (Form 8-K), at 2 (May 24, 2011).

Table 9 compares the average shareholder vote for LGBT-inclusive resolutions from 2005 to 2008 versus the average vote for the period from 2009 to 2012. Between 2009 and 2012, there was a slight increase in the maximum percentage of votes in favor of LGBT-inclusive resolutions as compared to the period between 2005 and 2008—61.7% versus 55.5%.<sup>155</sup>

Table 9: Average Percentage Vote for LGBT-Inclusive Shareholder Resolutions, 2005–2008 Versus 2009–2012<sup>156</sup>

	2005–2008	2009–2012	Total
Average Percentage Vote in Favor of LGBT-Inclusive Resolution	27.2%	32.6%	30.0%
Minimum	1.6% <sup>157</sup>	10.7% <sup>158</sup>	1.6% <sup>159</sup>
Maximum	55.5% <sup>160</sup>	61.7% <sup>161</sup>	61.7% <sup>162</sup>
Number of Resolutions	33	36	69

Between 2005 and 2012, there were 16 companies that put LGBT-inclusive resolutions to a vote multiple times.<sup>163</sup> Of these, 12 showed an increase in the percentage of shareholder vote in favor of the resolutions, while 4 showed a decrease.<sup>164</sup> The average absolute increase of support was 9.8% across those 12 companies.<sup>165</sup> The average absolute decrease of support for the resolutions was 6.5% across the other 4 companies.<sup>166</sup>

#### IV. ARGUMENTS FOR AND AGAINST PROPOSALS BY SHAREHOLDER PROPONENTS AND COMPANIES

This Part outlines the arguments advanced by shareholder proponents and companies' boards of directors for and against LGBT-inclusive and LGBT-exclusive shareholder resolutions. Setting aside the persuasiveness

<sup>155</sup> See *infra* Table 9.

<sup>156</sup> Database of shareholder resolutions on file with author.

<sup>157</sup> See EchoStar Commc'ns, Corp., *supra* note 148, at 42.

<sup>158</sup> See Wal-Mart Stores, Inc., Current Report (Form 8-K), at 3 (June 9, 2011).

<sup>159</sup> See EchoStar Commc'ns, Corp., *supra* note 148, at 42.

<sup>160</sup> See Micron Tech., Inc., Quarterly Report (Form 10-Q), at 36 (Jan. 16, 2007).

<sup>161</sup> See KBR, Inc., *supra* note 154, at 2.

<sup>162</sup> *Id.*

<sup>163</sup> Database of shareholder resolutions on file with author. Note that the first vote and last vote may advocate for different protections (e.g., sexual orientation only versus sexual orientation and gender identity).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

and accuracy of these arguments, this Part also examines these arguments in the context of the SEC's response to requests for favorable no-action letters. It explores, for example, which arguments advanced by shareholder proponents and boards of directors have succeeded and which have failed before the SEC.

### A. *LGBT-Inclusive Resolutions*

#### 1. Arguments Advanced by Shareholder Proponents in Favor of LGBT-Inclusive Resolutions

Shareholder proposals in favor of instituting LGBT-inclusive resolutions typically ask companies to simply amend their nondiscrimination policies to prohibit discrimination based on sexual orientation, gender identity, or both.<sup>167</sup> However, some request that the company take a much broader view of nondiscrimination—for example, prohibiting discrimination not only in the hiring and firing of employees but also in corporate advertising and corporate donations.<sup>168</sup> To support their recommendations, shareholders cite a variety of rationales in their proposals filed with the company's proxy materials. Broadly, the rationales advanced by shareholders fall into the following four categories: (1) peer influence, (2) public opinion, (3) employee-focused, and (4) company-focused.

##### a. *Peer Influence*

Rationales leveraging peer influence typically cite statistics on the company's peers—by revenue, size, industry, or location—that have instituted LGBT-inclusive EEO policies or other LGBT-friendly employee benefits or programs. For example, shareholders have highlighted the following:

- Many similarly sized peer companies have instituted LGBT-inclusive EEO policies, typically, citing the proportion of Fortune 500 companies,

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<sup>167</sup> See, e.g., Am. Fin. Grp., Definitive Proxy Statement (Schedule 14A), at 18 (Apr. 2, 2012) (requesting that “American Financial Group amend its written equal employment opportunity policy to explicitly prohibit discrimination based on sexual orientation and gender identity and to substantially implement the policy”).

<sup>168</sup> See, e.g., Eastman Chem. Co., Preliminary Proxy Statement (Schedule 14A), at 17 (Mar. 20, 2008) (“A number of Fortune 500 corporations have implemented non-discrimination policies encompassing the following principles: . . . [c]orporate advertising policy will avoid the use of negative stereotypes based on sexual orientation or gender identity . . . [t]here shall be no discrimination in the sale of goods and services based on sexual orientation or gender identity, and . . . [t]here shall be no policy barring on corporate charitable contributions to groups and organizations based on sexual orientation.”); Murphy Oil Corp., Definitive Proxy Statement (Schedule 14A), at 24 (Mar. 28, 2008) (same).

according to the HRC Equality Index, that prohibit employment discrimination based on sexual orientation or gender identity or expression;<sup>169</sup>

- Many of the company's industry peers and competitors have instituted LGBT-inclusive EEO policies;<sup>170</sup> and
- Many of the company's peers with headquarters in the same city have instituted LGBT-inclusive EEO policies.<sup>171</sup>

Note that while I categorize the statement of a company's existing policies as "Other" and do not label it a successful outcome in Table 6, the confirmation that a company's existing policies provide workplace protections for LGBT employees can also be a successful outcome, particularly where the company's policies are unclear.

#### b. *Public Opinion*

Shareholder proponents also argue that public opinion has shifted in favor of equal rights in the workplace for LGBT individuals. In proposals seeking policy change, shareholders have emphasized the following:

- National opinion polls support providing equal workplace rights to LGBT individuals;<sup>172</sup>

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<sup>169</sup> *E.g.*, Am. Fin. Grp., *supra* note 167, at 18 (proposing a sexual orientation nondiscrimination policy and highlighting that "[o]ver 89% of the Fortune 500 companies have adopted written nondiscrimination policies prohibiting harassment and discrimination on the basis of sexual orientation"); AmSouth Bancorp., *supra* note 101, at 38 ("AmSouth is increasingly alone in its position [of lacking an explicit nondiscrimination policy], as 98% of Fortune 100 companies, and more than 80% of the Fortune 500 companies, have adopted written nondiscrimination policies prohibiting discrimination and harassment on the basis of sexual orientation . . . ." (internal citation omitted)). While most shareholder proposals that employ this rationale focus solely on the existence of written nondiscrimination policies, some also cite statistics on the percentage of companies that utilize other methods of communicating LGBT tolerance, such as diversity training programs, employee access to affinity groups, domestic partner health insurance, and other LGBT-friendly employee benefits and policies. *E.g.*, Commercial Metals Co., Definitive Proxy Statement (Schedule 14A), at 48 (Dec. 12, 2008).

<sup>170</sup> *E.g.*, Expeditors Int'l of Wash., Definitive Proxy Statement (Schedule 14A), at 23 (Apr. 4, 2006) ("Our competitors EGL and UPS explicitly prohibit this form of discrimination in their written policies, according to the Human Rights Campaign.").

<sup>171</sup> *E.g.*, AmSouth Bancorp., *supra* note 101, at 38 ("Other major corporate employers in Birmingham including General Motors, Regions Financial, Saks, Inc[.], and University of Alabama, also explicitly prohibit this form of discrimination in their written policies."); Commercial Metals Co., *supra* note 169, at 48 ("Other major corporate employers located in Texas . . . explicitly prohibit this form of discrimination in their written policies."); Pentair, Inc., Definitive Proxy Statement (Schedule 14A), at 41 (Mar. 23, 2007).

<sup>172</sup> *See, e.g.*, Advance Auto Parts, Inc., Definitive Proxy Statement (Schedule 14A), at 12 (Apr. 13, 2005) ("National public opinion polls consistently find more than three-quarters of the

- Increasingly, heterosexuals have supported providing equal workplace rights to LGBT individuals;<sup>173</sup> and
- Many states and localities prohibit employment discrimination based on sexual orientation, gender identity, or both.<sup>174</sup>

c. *Employee-Focused*

Employee-focused arguments describe the detrimental effects of employment discrimination on employees. These justifications have included the following:

- LGBT employees frequently experience discrimination in the workplace, as evidenced by recent survey data;<sup>175</sup> and
- “Employment discrimination on the basis of sexual orientation diminishes employee morale and productivity.”<sup>176</sup>

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American people support equal rights in the workplace for gay men, lesbians and bisexuals.”); Amerco, Definitive Proxy Statement (Schedule 14A), at 33 (July 18, 2012) (same).

<sup>173</sup> See, e.g., Expeditors Int’l of Wash., *supra* note 170, at 23 (“According to a September 2005 survey by Harris Interactive and Witeck–Combs, 57% of heterosexual respondents consider it extremely or very important that a company have a written non-discrimination policy that includes sexual orientation, compared to only 43% in 2002.”).

<sup>174</sup> E.g., Am. Fin. Grp., *supra* note 167, at 18 (“Twenty-one states, the District of Columbia and more than 160 cities and counties, have laws prohibiting employment discrimination based on sexual orientation; 12 states and the District of Columbia have laws prohibiting employment discrimination based on sexual orientation and gender identity.”); AmSouth Bancorp., *supra* note 101, at 38 (“Sixteen states, the District of Columbia and more than 140 cities, including St. Louis, have laws prohibiting employment discrimination based on sexual orientation.”); see also Anadarko Petroleum Corp., Definitive Proxy Statement (Schedule 14A), at 86 (Mar. 23, 2012) (“[C]ourts have sometimes interpreted other antidiscrimination statutes [sic], like those protecting individuals based on their gender, to include gender identity . . . [T]he jobs web site of the U.S. federal government includes language that explicitly bans employment discrimination based on gender identity.”).

<sup>175</sup> E.g., Advance Auto Parts, Inc., *supra* note 172, at 12 (“A recent National Gay and Lesbian Task Force study has found that 16%-44% gay men and lesbians in twenty cities nationwide experienced workplace harassment or discrimination based on their sexual orientation.”); AmSouth Bancorp., *supra* note 101, at 38 (“According to a September 2002 survey by Harris Interactive and Witeck–Combs, 41% of gay and lesbian workers in the United States reported an experience with some form of job discrimination related to sexual orientation; almost one out of every 10 gay or lesbian adults also stated that they had been fired or dismissed unfairly from a previous job, or pressured to quit a job because of their sexual orientation.”).

<sup>176</sup> E.g., DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 32 (Apr. 25, 2008); see also HCC Ins. Holdings, Inc., Definitive Proxy Statement (Schedule 14A), at 42 (Apr. 13, 2007) (proposing a nondiscrimination policy for sexual orientation, in part, because such discrimination “diminishes employee morale”).

d. *Company-Focused*

Company-focused arguments describe the positive effects that LGBT-inclusive EEO policies can have on the company's bottom line. The following are examples of company-focused reasons that shareholders have cited:

- “[C]orporations that prohibit workplace discrimination, including discrimination on the basis of gender identity, have a competitive advantage in recruiting and retaining employees;”<sup>177</sup>
- “[The] company has operations in, and makes sales to, institutions in states and cities that prohibit discrimination on the basis of sexual orientation;”<sup>178</sup>
- “The company has an interest in preventing discrimination and resolving complaints internally so as to avoid costly litigation and damage its reputation as an equal opportunity employer;”<sup>179</sup> and
- Some cities “have adopted legislation restricting business with companies that do not guarantee equal treatment for gay and lesbian employees.”<sup>180</sup>

2. Companies' Responses Against LGBT-Inclusive Resolutions

Proxy materials sent to shareholders not only give the shareholder proponent a platform for making arguments in favor of the resolution, but also permit the board of directors to respond to the resolution and recommend their own course of action.<sup>181</sup> Boards of directors almost uniformly recommend against implementing LGBT-inclusive resolutions—I was unable to find a single instance of a board of directors offering support for such a resolution and only found one instance of a board of directors that declined to respond to the proposal.<sup>182</sup> As discussed below, boards of directors typically advance the following arguments against these resolutions: (1) the company's existing EEO policy provides adequate protections; (2) the company complies with the requirements of federal law; (3) there has been a

<sup>177</sup> *E.g.*, Anadarko Petroleum Corp., *supra* note 174, at 86; Pentair, Inc., *supra* note 171, at 41.

<sup>178</sup> *E.g.*, AmSouth Bancorp., *supra* note 101, at 38; Eastman Chem. Co., *supra* note 168, at 17.

<sup>179</sup> *E.g.*, DISH Network Corp., *supra* note 176, at 32; HCC Ins. Holdings, Inc., *supra* note 176, at 42.

<sup>180</sup> *E.g.*, Amerco, *supra* note 172, at 32; Eastman Chem. Co., *supra* note 168, at 17.

<sup>181</sup> See 17 C.F.R. § 240.14a-8(m) (2013) (“The company may elect to include in its proxy statement reasons why it believes shareholders should vote against [a] proposal. The company is allowed to make arguments reflecting its own point of view . . .”).

<sup>182</sup> See Amerco, *supra* note 172, at 33 (affirming the company's intolerance for discrimination or harassment but stating that “[t]he Board makes no recommendation with respect to this proposal” (emphasis omitted)).



lack of shareholder support at the company and at other companies for such proposals; or (4) other arguments regarding finance or competition.

a. *Unnecessary to Revise Existing EEO Policy*

The most common rationale given by companies against LGBT-inclusive resolutions is that it is not necessary to revise the company's existing EEO policy. For example, boards have asserted the following:

- There is no need to adopt the shareholder's proposal because the company's current policies provide adequate protections to LGBT individuals against discrimination;<sup>183</sup> and
- The company has not had any complaints filed against it for discrimination by sexual orientation or gender identity.<sup>184</sup>

b. *Company Complies with the Requirements of Federal Law*

Additionally, companies argue that their current EEO policies comply with federal law and that additional protections are not necessary. For example, companies have argued as follows:

- Federal law does not prohibit employment discrimination on the bases of sexual orientation and gender identity;<sup>185</sup> and

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<sup>183</sup> See, e.g., Leggett & Platt, Inc., Definitive Proxy Statement (Schedule 14A), at 29 (Mar. 30, 2012) ("We are committed to the highest ethical standards, which include assuring equal employment and promotional opportunities *free of discrimination on any basis* other than merit and performance-related qualifications."); W. Refining, Inc., Definitive Proxy Statement (Schedule 14A), at 27 (Apr. 16, 2009) ("Western Refining has a zero tolerance policy for any conduct that is intended to or has the effect of creating an intimidating, hostile or offensive work environment. We hire and promote on the basis of merit and performance."). Companies may also discuss extensively the protections in place for other groups, seemingly to distract shareholders from the resolution's core issue—that the company lacks explicit protections for LGBT individuals. See, e.g., Gardner Denver, Inc., Definitive Proxy Statement (Schedule 14A), at 27 (Mar. 17, 2010) ("Our global Code of Ethics and Business Conduct . . . expressly prohibits discrimination and harassment based on characteristics protected by law, such as race, color, national origin, religion, gender, age, marital status, disability, veteran status or citizenship status."); W. Refining, Inc., *supra*, at 27 ("Our Code of Business Conduct and Ethics and our Personnel Reference Manual . . . expressly prohibit discrimination, sexual harassment or other unlawful harassment based on . . . any . . . legally-protected category under federal, state or local law.").

<sup>184</sup> See, e.g., Gardner Denver, Inc., *supra* note 183, at 27 ("In a company with more than 6,000 employees operating in 33 countries, the Board and executive officers of the Company are not aware of a single complaint of discrimination based on sexual orientation or gender identity being reported through our ethics hotline established pursuant to our Code of Ethics and Business Conduct filed with any city, state or federal agency.").

<sup>185</sup> See, e.g., Commercial Metals Co., *supra* note 169, at 49 ("Congress has repeatedly declined to add sexual orientation and gender identity/expression to those forms of discrimination

- The company's current EEO policy meets the requirements of federal law.<sup>186</sup>

c. *Lack of Shareholder Support*

Companies also frequently cite the failure of previous shareholder votes on LGBT-inclusive resolutions as evidence that shareholders generally disfavor such resolutions. For example, board responses have included the following:

- Previous votes for nondiscrimination policies for LGBT employees at the company have failed;<sup>187</sup> and
- Previous votes for nondiscrimination policies for LGBT employees at *other* companies have failed.<sup>188</sup>

d. *Other Responses*

Companies have also cited a variety of other reasons for their opposition to LGBT-inclusive resolutions, including the following:

- Providing nondiscrimination protections to LGBT employees would lead to proponents "later seek[ing] to add domestic partner benefits to [the Company's] medical and other benefits plans, which could add significant costs . . . and place the Company at a disadvantage to . . . competitors who do not offer [such] benefits;"<sup>189</sup>

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specifically prohibited under federal law."); EchoStar Commc'ns Corp., Definitive Proxy Statement (Schedule 14A), at 26 (Aug. 24, 2005) ("The Board believes that adding to our written policy additional special categories which are not prohibited by federal law undercuts our objective of highlighting federally prohibited activities.").

<sup>186</sup> See, e.g., KBR, Inc., Definitive Proxy Statement (Schedule 14A), at 70 (Apr. 6, 2011) ("The Board of Directors does not believe it is in the best interest of the company or its employees to expand the list of personal attributes covered by KBR's nondiscrimination policy beyond those which are protected by federal law. To do so would, we believe, weaken the comprehensive nature of the policy . . .").

<sup>187</sup> E.g., Leggett & Platt, Inc., *supra* note 183, at 29 ("Leggett's shareholders defeated similar proposals at the Company's last six annual meetings. We believe this consistent rejection by shareholders sends a clear message to our Board that Leggett should oppose this unnecessary addition to our nondiscrimination policy."); TECO Energy, Inc., Definitive Proxy Statement (Schedule 14A), at 31 (March 14, 2012) ("[L]ess than one-quarter of the votes cast at the 2011 annual meeting on this matter were for the proposal.").

<sup>188</sup> E.g., Commercial Metals Co., *supra* note 169, at 49 ("In those instances where stockholders at other companies have been allowed to vote on proposals of this nature they generally have not received majority support.").

<sup>189</sup> E.g., *id.* at 49; Leggett & Platt, Inc., Definitive Proxy Statement (Schedule 14A), at 27 (Mar. 27, 2008).

- There is no evidence that the lack of a nondiscrimination policy for LGBT employees puts the company at a competitive disadvantage in attracting and retaining employees;<sup>190</sup>
- The company's policies are similar to those of many peer companies;<sup>191</sup> and
- Implementing protections for LGBT employees would "divert attention from the overall goal of a truly non-discriminatory workplace."<sup>192</sup>

### 3. SEC Response to LGBT-Inclusive Resolutions

#### a. Failed Arguments for Excluding LGBT-Inclusive Proposals

This subsection describes the substantive grounds proffered by companies and rejected by the SEC for excluding an LGBT-inclusive shareholder proposal.

Rule 14a-8(i)(3) allows a company to exclude a shareholder proposal if it violates proxy rules<sup>193</sup> (e.g., the Rule 14a-9 prohibition against making false and misleading statements in a proxy statement).<sup>194</sup> In 2004, OGE Energy argued unsuccessfully that statements about LGBT employment discrimination and the competitive edge that can be gained from prohibiting such discrimination are false and misleading because they imply that the company currently discriminates against LGBT employees and that the company is at a competitive disadvantage.<sup>195</sup> The company also argued unsuccessfully that statements about state and local legislation prohibiting LGBT employment

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<sup>190</sup> See, e.g., Eastman Chem. Co., *supra* note 168, at 18 ("[T]he Company does not believe that it suffers any competitive disadvantage in recruiting or retaining employees or in customer relationships as a result of its employment practices or the language contained in its nondiscrimination policy."); KBR, Inc., *supra* note 186, at 70 ("[W]e believe that our current policy against discrimination and harassment and our procedures to ensure that discrimination does not occur, put us in a position to recruit and retain a diverse workforce of many different cultures, races and backgrounds who each contribute their unique experiences to KBR's projects and customers.").

<sup>191</sup> See, e.g., TECO Energy, Inc., *supra* note 187, at 31 ("The proponent's statement refers to statistics which appear to present our company's policies as being inconsistent with our peer companies; however, our non-discrimination policy is actually similar to that of the vast majority of other Fortune 1000 companies.").

<sup>192</sup> See, e.g., ConocoPhillips, Definitive Proxy Statement (Schedule 14A), at 87 (Mar. 31, 2011) ("It is not practical or even possible to list all categories on which to prohibit discrimination. The Board believes that such an effort would only divert attention from the overall goal of a truly non-discriminatory workplace.").

<sup>193</sup> 17 C.F.R. § 240.14a-8(i)(3) (2013).

<sup>194</sup> *Id.* § 240.14a-9.

<sup>195</sup> See OGE Energy, Inc., SEC No-Action Letter, 2004 WL 351798, at \*7-8 (Feb. 24, 2004) (rejecting OGE's characterization of a proposal as "false or misleading" based on their perceived implication of a competitive disadvantage).

discrimination are false and misleading because they imply that the company is violating the law.<sup>196</sup>

Rule 14a-8(i)(7) permits a company to exclude a shareholder proposal “[i]f the proposal deals with a matter relating to the company’s ordinary business operations.”<sup>197</sup> Salary and other employment issues “go to the heart of the ordinary business exclusion,” since management is likely to be in a more informed position than shareholders to determine the salary levels that would best attract and retain talent.<sup>198</sup> However, in 1976, the SEC created a “‘significant social policy’ exception to allow shareholder proposals that raise important issues to be included in management’s proxy materials even when those issues concern the company’s ordinary business.”<sup>199</sup> In 1992, the SEC initially suggested, regarding the first LGBT-inclusive proposal, “that employment-based proposals would be treated as ordinary business decisions even if they raised significant social policy issues and would therefore always be excludable by corporations”—the “*Cracker Barrel* Standard.”<sup>200</sup> However, in 1998, the SEC eliminated the *Cracker Barrel* Standard, determining that “the relative importance of certain social issues relating to employment matters has reemerged as a consistent topic of widespread public debate.”<sup>201</sup>

The SEC now considers two factors in determining whether a proposal falls within the ordinary business operations exclusion: (1) whether the “task[ is] so fundamental to management’s ability to run [the] company on a day-to-day basis that [it] could not, as a practical matter, be subject to direct shareholder oversight;” and (2) “the degree to which the proposal seeks to ‘micro-manage’ the company by probing too deeply into matters of a complex nature upon which shareholders . . . would not be in a position to make an informed judgment.”<sup>202</sup> In 2008, the SEC granted a request by Apache Corporation to exclude an LGBT-inclusive proposal under Rule 14a-8(i)(7)—the exclusion was confirmed by a declaratory judgment in the Southern District of Texas.<sup>203</sup> The shareholder proponent’s proposal advocated for the adoption of a nondiscrimination policy prohibiting discrimination across various facets

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<sup>196</sup> See *id.* at \*11 (“The Company argues that these clauses [in the proposal] falsely imply that OGE is violating state and local law. Again, [the SEC] do[es] not believe the statements imply this . . .”).

<sup>197</sup> 17 C.F.R. § 240.14a-8(i)(7).

<sup>198</sup> Roy, *supra* note 5, at 1523.

<sup>199</sup> *Id.* at 1522 (footnote omitted).

<sup>200</sup> *Id.* at 1524 (footnote omitted).

<sup>201</sup> *Id.* at 1526.

<sup>202</sup> *Id.* at 1526-27.

<sup>203</sup> *Id.* at 1514.

of the company's culture, including "the recognition of employee groups[,] . . . corporate advertising and marketing policy[, and] . . . corporate charitable contributions to groups."<sup>204</sup> The court found that several of the above principles in the shareholder resolution did not "implicate the underlying social policy, [and that] the Proposal [sought to] micromanage the company to an unacceptable degree."<sup>205</sup>

This case seems to have ended the offering of LGBT-inclusive proposals based on broad notions of nondiscrimination that affect matters outside of direct employment policy, such as the Equality Principles. However, it does not seem to have impacted the success of "plain-vanilla" proposals that simply aim to include sexual orientation or gender identity in a company's existing EEO policy. Although companies have frequently attempted to exclude proposals under the ordinary business operations exclusion, with the exception of Apache Corporation, this approach has generally been unsuccessful.<sup>206</sup>

Rule 14a-8(i)(10) allows a company to exclude a shareholder "[i]f the company has already substantially implemented the proposal."<sup>207</sup> In 2007 and 2009, the SEC refused to permit Armor Holdings, Incorporated and Chesapeake Energy, respectively, to exclude shareholder proposals to add *both* sexual orientation and gender identity to the companies' EEO policies on the basis of substantial implementation, when their current EEO policy included only sexual orientation.<sup>208</sup> In 2004, the SEC refused to permit both OGE Energy, Incorporated and Emerson Electric Company to exclude LGBT-inclusive shareholder proposals on the basis of substantial implementation when they had not explicitly included the protected characteristics—for example, "sexual orientation"—in their formal EEO policies.<sup>209</sup> Additionally, when the shareholder proposal requests that the company amend its EEO policy, excluding the proposal and pointing to

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<sup>204</sup> *Id.* at 1513 n.6.

<sup>205</sup> *Apache Corp. v. N.Y.C. Employees' Retirement Sys.*, 2008 WL 1821728, No. 08-1064, at \*452-53 (Apr. 22, 2008).

<sup>206</sup> See *infra* Tables 10-11 (enumerating unsuccessful and successful bases for exclusion).

<sup>207</sup> 17 C.F.R. § 240.14a-8(i)(10) (2013).

<sup>208</sup> See *Armor Holdings, Inc.*, SEC No-Action Letter, 2007 WL 1152669, at \*6 (Apr. 3, 2007); *Chesapeake Energy Corp.*, SEC No-Action Letter, 2009 WL 926908 (Mar. 30, 2009).

<sup>209</sup> See *Emerson Elec. Co.*, SEC No-Action Letter, 2004 WL 2495093, at \*6 (Oct. 20, 2004) ("[W]e believe that it is important for the Company to adopt a formal, written EEO policy including the words 'sexual orientation' . . . . Mentioning sexual orientation in training materials is not a substitute for including it in [sic] EEO policy . . . ."); *OGE Energy, Inc.*, *supra* note 195, at \*9-10.

other human resources documents, such as an anti-harassment policy would also not be sufficient.<sup>210</sup>

Rule 14a-8(i)(12) allows a company to exclude “[r]esubmissions” where “the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company’s proxy materials within the preceding 5 calendar years.”<sup>211</sup> In 2004, Emerson Electric argued that it could exclude a proposal because state law requires it to consider abstentions and broker nonvotes in determining whether the proposal passed, thus reducing the percentage of votes in favor of the proposal, when compared to the percentages of votes for and against.<sup>212</sup> The SEC, however, had stated that, for the purposes of Rule 14a-8(i)(12), the voting percentage should be determined using only votes cast for and votes cast against the proposal, excluding abstentions.<sup>213</sup> Therefore, the SEC did not permit Emerson Electric to exclude the proposal on these grounds, underscoring that Rule 14a-8(i)(12) is independent of state law mandates for calculating voting percentages regarding approval of shareholder proposals.<sup>214</sup>

Table 10: Failed Arguments for Excluding LGBT-Inclusive Resolutions Proffered by Companies

Date of SEC Letter	Company	Failed Arguments for Exclusion
February 24, 2004	OGE Energy, Inc.	14a-8(i)(3), 14a-8(i)(7), 14a-8(i)(10)
October 20, 2004	Emerson Electric Co.	14a-8(i)(10), 14a-8(i)(12)
March 2, 2006	Aquila, Inc.	14a-8(i)(10)
April 3, 2007	Armor Holdings, Inc.	14a-8(i)(7), 14a-8(i)(10)
March 30, 2009	Chesapeake Energy Corp.	14a-8(i)(10)
January 6, 2010	Verizon Communications, Inc.	14a-8(b), 14a-8(f), 14a-8(i)(3)
March 20, 2012	Exxon Mobil	14a-8(i)(7)

<sup>210</sup> See Emerson Elec. Co., *supra* note 209, at \*1-2 (presenting Emerson’s argument for substantial implementation on the bases of “an official company-wide policy barring all discrimination” and a “hotline for reporting discrimination and other complaints”).

<sup>211</sup> 17 C.F.R. § 240.14a-8(i)(12). This rule further states that such proposals may be excluded “from [the company’s] proxy materials for any meeting held within 3 calendar years of the last time it was included,” subject to certain voting thresholds. *Id.*

<sup>212</sup> See Emerson Elec. Co., *supra* note 209, at \*2 (including abstentions in the voting tabulation, and noting that the proposal in question had not garnered enough support to require inclusion in the company’s proxy materials).

<sup>213</sup> *Id.* at \*8.

<sup>214</sup> *Id.* at \*7-8.

b. *Successful Arguments for Excluding LGBT-Inclusive Proposals*

The SEC has infrequently permitted the exclusion of LGBT-inclusive proposals. Of the four LGBT-inclusive resolutions I found that have been excluded since 2000, two were excluded on procedural grounds.<sup>215</sup> In 2009, the SEC permitted American Financial Group to exclude a proposal based on Rule 14a-8(h)(3) because neither the shareholder proponent nor a representative appeared at the prior year's annual meeting to present a similar proposal.<sup>216</sup> Additionally, the shareholder proponent failed to provide "good cause" for its failure to appear.<sup>217</sup> Further, in 2012, the SEC permitted Alpha Natural Resources to exclude a proposal based on Rule 14a-8(e)(2) because the shareholder proponent did not submit the proposal by the deadline.<sup>218</sup>

I found two instances of the SEC permitting exclusion of LGBT-inclusive proposals on substantive grounds.<sup>219</sup> As discussed in the previous subsection, in 2008, the SEC permitted Apache Corporation to exclude a proposal on the basis of Rule 14a-8(i)(7) because the proposal had a broad notion of nondiscrimination that touched matters—such as marketing and corporate donations—beyond direct employment matters that would be covered by an EEO policy.<sup>220</sup> Additionally, in 2009, the SEC permitted Commercial Metals Company to exclude a proposal based on Rule 14a-8(i)(10), finding that the company had substantially implemented the proposal's recommendations by amending its EEO policy to explicitly include sexual orientation and gender identity.<sup>221</sup>

Not only has the SEC generally refused to issue favorable no-action letters on LGBT-inclusive resolutions, it has also generally not required shareholder proponents to modify their proposals. In fact, I have found only one such instance since 2000 in which the SEC permitted the company to exclude the proposal, barring amendment by the shareholder.<sup>222</sup> As discussed earlier in subsection III.B.4, employment-based shareholder proposals have a lower rate of omission than average among social policy proposals—6.9% versus 15.2%.

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<sup>215</sup> See *infra* Table 11.

<sup>216</sup> Am. Fin. Grp., SEC No-Action Letter, 2009 WL 800013, at \*2 (Mar. 6, 2009).

<sup>217</sup> *Id.*

<sup>218</sup> Alpha Natural Resources, Inc., SEC No-Action Letter, *supra* note 58, at \*1.

<sup>219</sup> See *infra* Table 11.

<sup>220</sup> See *supra* notes 203-06.

<sup>221</sup> Commercial Metals Co., *supra* note 131, at \*1.

<sup>222</sup> See Emerson Elec. Co., SEC No-Action Letter, 2000 WL 1634117, at \*1 (Oct. 27, 2000) (stating that the company may exclude an LGBT-inclusive proposal, unless the shareholder proponent deletes a specific clause).

Table 11: Successful Arguments for Excluding LGBT-Inclusive Resolutions Proffered by Companies

Date of SEC Letter	Company	Successful Arguments for Exclusion
March 5, 2008	Apache Corp.	14a-8(i)(7)
March 6, 2009	American Financial Group	14a-8(h)(3)
November 5, 2009	Commercial Metals Co.	14a-8(i)(10)
March 5, 2012	Alpha Natural Resources	14a-8(e)(2)

### B. *LGBT-Exclusive Resolutions*

#### 1. Arguments Used by Shareholders for LGBT-Exclusive Resolutions

Shareholder proponents seeking to remove sexual orientation or gender identity from a company's EEO policies typically provide reasons that fall within one or more of the following categories: (1) sexual orientation is a private matter; (2) the company should not provide benefits to LGBT individuals or their partners; and (3) society has traditionally discouraged or prohibited homosexual acts.

##### a. *Sexual Orientation Is a Private Matter*

Shareholder proponents of LGBT-exclusive resolutions often argue that sexual orientation is a private matter, particularly in the workplace. The following are some of the arguments shareholder proponents have advanced in support of this claim:

- “[U]nlike the issues of race, age, gender and certain physical disabilities, it would be impossible to discern a person's sexual orientation from their appearance;”<sup>223</sup>
- “[I]t would be inappropriate and possibly illegal to ask a job applicant or employee about their sexual interests, inclinations and activities;”<sup>224</sup>
- “[I]t is likewise inappropriate and legally problematic for employees to discuss personal sexual matters on the job;”<sup>225</sup> and
- The U.S. Armed Forces had a “Don't Ask Don't Tell” policy for eighteen years.<sup>226</sup>

<sup>223</sup> E.g., Pac. Gas & Elec., Definitive Proxy Statement (Schedule 14A), at 77 (Apr. 2, 2012).

<sup>224</sup> E.g., Am. Express Co., *supra* note 101, at 18 (Mar. 22, 2006).

<sup>225</sup> E.g., Ford Motor Co., Definitive Proxy Statement (Schedule 14A), at 56 (Apr. 7, 2006).



b. *The Company Should Not Provide Benefits to LGBT Individuals or Their Partners*

Shareholder proponents of LGBT-exclusive resolutions also argue that including sexual orientation or gender identity in the company's EEO policy is a necessary precedent to offering benefits for domestic partners.<sup>227</sup> Opposition to providing benefits for domestic partners is further fueled by the belief that people who have same-sex relations are at an increased risk for sexually transmitted diseases, and the company should not provide benefits to people who willfully engage in risky behavior.<sup>228</sup>

c. *Society Has Traditionally Discouraged or Prohibited Same-Sex Relations*

Shareholder proponents have also posited that companies should remove sexual orientation or gender identity from their nondiscrimination policies because society has traditionally discouraged same-sex relations and encouraged marriage between heterosexuals. Some of the arguments shareholder proponents have offered in support of this claim include the following:

- “[Unmarried, homosexual] relations have been condemned by the major traditions of Judaism, Christianity and Islam for a thousand years or more;”<sup>229</sup>
- “[M]arriage between heterosexuals has been protected and encouraged by a wide range of societies, cultures and faiths for ages;”<sup>230</sup> and
- “[C]ohabitation, regardless of sexual orientation, is illegal in . . . several . . . states.”<sup>231</sup>

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<sup>226</sup> See, e.g., Pac. Gas & Elec., *supra* note 223, at 77 (“[T]he Armed Forces of the United States is one of the largest and most diverse organizations in the world. They protected the security of us all while adhering to a ‘don’t ask, don’t tell policy’ regarding sexual interests for 18 years from 1993–2011.”).

<sup>227</sup> See, e.g., Am. Express Co., *supra* note 101, at 18 (“[A]ccording to the Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual, and transgender political organization, on their website states, ‘an inclusive non-discrimination policy (one that refers to sexual orientation) is a key facet of the rationale for extending domestic partner benefits.’ The HRC adds, ‘Establishing a benefits policy that includes your company’s gay and lesbian employees is a logical outgrowth of your company’s own non-discrimination policy . . . .’” (omission in original)).

<sup>228</sup> See, e.g., *id.* (“[O]ur company does not discriminate against tobacco users when they apply for a job even though they are not protected by any employment clause. It also does not pay tobacco users benefits based on their engaging in this personally risky behavior . . . . [T]hose who engage in homosexual sex are at a significantly higher risk for HIV/AIDS and sexually transmitted diseases.”).

<sup>229</sup> E.g., Pac. Gas & Elec. Co., *supra* note 223, at 77.

<sup>230</sup> E.g., *id.*

## 2. Companies' Responses Against LGBT-Exclusive EEO Policies

As with LGBT-inclusive EEO policies, boards of directors often recommend against LGBT-exclusive policies.<sup>232</sup> Boards of directors typically detail the following categories of rationales for their recommendations: (1) implementing an LGBT-exclusive EEO policy may spark litigation against the company; (2) implementing an LGBT-exclusive EEO policy would harm the company's business; and (3) other arguments.

### a. *Implementing an LGBT-Exclusive EEO Policy May Spark Litigation Against the Company*

Boards of directors have warned shareholders of the risk of lawsuits resulting from removing sexual orientation or gender identity from the company's EEO policy, arguing the following:

- Implementing an LGBT-exclusive EEO policy may incite "lawsuits that could diminish shareholder value;"<sup>233</sup> and
- Implementing an LGBT-exclusive EEO policy would result in violations of the laws of many states and cities that prohibit discrimination on the basis of sexual orientation or gender identity.<sup>234</sup>

### b. *Implementing an LGBT-Exclusive EEO Policy Would Harm the Company's Business*

In addition to the above, companies have also described various ways in which an EEO policy without reference to sexual orientation or gender identity would hurt the company's business, such as the following:

- An LGBT-exclusive EEO policy would hinder the company's ability to maintain a diverse workforce;<sup>235</sup> and

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<sup>231</sup> E.g., Am. Express Co., *supra* note 101, at 18.

<sup>232</sup> See, e.g., Ford Motor Co., *supra* note 225, at 56-57 (opposing a proposal to amend Ford's EEO policy to exclude any reference to privacy issues related to sexual interests, activities, or orientation).

<sup>233</sup> E.g., Bank of Am., Definitive Proxy Statement (Schedule 14A), at 45 (Mar. 20, 2006).

<sup>234</sup> E.g., Pac. Gas & Elec. Co., *supra* note 223, at 78 ("The proposed amendment to the Policy Statement (i.e., deletion of any reference to sexual orientation) would make the Policy Statement inconsistent with California state law, which prohibits harassment and discrimination on the basis of sexual orientation.").

<sup>235</sup> E.g., Ford Motor Co., *supra* note 225, at 57 ("Ford, and numerous other leading companies, believe that a diverse workforce, free of discrimination, is the most advantageous environment to attract and retain talented employees and to allow them to excel in their jobs.

- An LGBT-exclusive EEO policy would hinder the ability of the company to work with clients that are prohibited from doing business with entities “that discriminate on the basis of sexual orientation.”<sup>236</sup>

c. *Other Arguments*

Other arguments that boards of directors have advanced in opposition to LGBT-exclusive resolutions include the following:

- An LGBT-exclusive EEO policy “would prevent the company from providing employee benefits to domestic partners;”<sup>237</sup>
- The proposal would interfere with management’s ability to run the company on a day-to-day basis, and would thus be adverse to shareholders’ interests;<sup>238</sup>
- The proposal “is not in the best interests of the shareholders or the Company;”<sup>239</sup> and
- Anti-LGBT rights proposals are contrary to the core values of the company.<sup>240</sup>

### 3. SEC Responses to LGBT-Exclusive Resolutions

LGBT-exclusive resolutions have been far more susceptible than LGBT-inclusive resolutions to modification by the SEC. I did not, however, find any LGBT-exclusive resolutions, since 2000, that the SEC permitted to be

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Implementing the proposal would adversely affect Ford’s ability to attract and retain talented employees.”).

<sup>236</sup> See, e.g., Bank of Am., *supra* note 233, at 45 (“[M]any state and local laws prohibit state and municipal governments from doing business with companies that discriminate on the basis of sexual orientation. Without an inclusive equal employment opportunity policy the Corporation would not be able to obtain contracts with these entities.”).

<sup>237</sup> See, e.g., Am. Express Co., *supra* note 101, at 19.

<sup>238</sup> See, e.g., *id.* (“The proposal is also unwise because it deals with employee matters that relate solely to the Company’s ordinary business operations. Certain tasks, such as constructing employment policies that are designed to attract and retain an effective workforce, are fundamental to management’s ability to run a company on a day to day basis and should not be assigned to shareholders to decide.”).

<sup>239</sup> E.g., Ford Motor Co., *supra* note 225, at 57.

<sup>240</sup> See, e.g., Pac. Gas & Elec. Co., *supra* note 223, at 78 (“Implementing the proposal and amending the Policy Statement would be contrary to the fact that [the Corporation] is committed to protecting its employees against discrimination and harassment of any nature, including discrimination and harassment based on sexual orientation. This would also conflict with the Corporation’s value of respecting each other and celebrating our diversity.”).

excluded in their entirety.<sup>241</sup> Upon request by companies to exclude LGBT-exclusive resolutions, the SEC has typically advised that only certain of the shareholder proponent's arguments be deleted, recast as an opinion, or offered in conjunction with factual support in the form of citation to specific sources.<sup>242</sup> The SEC generally advises shareholder proponents to delete arguments linking LGBT individuals to inflammatory stereotypes—for example, pedophilia and a higher risk of contracting sexually transmitted diseases—from the resolution.<sup>243</sup> The SEC also recommends that shareholder proponents recast arguments discussing the opinions of employees, potential employees, shareholders, or customers as opinions or support them with facts, including citations.<sup>244</sup>

The SEC's extensive line-editing approach reflects its stance that employment-based proposals concerning nondiscrimination policies are generally includable in companies' proxy materials, whether or not they are LGBT-inclusive or LGBT-exclusive. However, while social policy proposals inherently take a social or political position that is sometimes controversial, proxy materials must not become a platform for voicing inflammatory views. In lieu of excluding an LGBT-exclusive proposal containing inflammatory statements in its entirety, the SEC has extensively line-edited them under the rationale that such statements are "false and misleading" under Rule 14a-9.<sup>245</sup> Whether a statement is considered too inflammatory to be included in a company's proxy materials seems to be a value-based decision dependent on the individual SEC reviewer and contemporary social mores.

The SEC has typically rebuffed company's efforts to exclude LGBT-exclusive resolutions in their entirety. Companies have proffered (and the SEC has rejected) Rules 14a-8(i)(3) (violation of proxy rules)<sup>246</sup> and 14a-8(i)(7) (management functions)<sup>247</sup> as grounds for excluding such proposals.

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<sup>241</sup> See *infra* Table 12.

<sup>242</sup> *Id.*

<sup>243</sup> See, e.g., Coca-Cola Co., SEC No-Action Letter, 2003 WL 122319, at \*4 (Jan. 7, 2003) (permitting the company to exclude the proposal if the shareholder proponent does not delete the following clause: "Research proves promoting homosexual lifestyles such as those in the Company's diversity programs promote pedophilia.").

<sup>244</sup> See, e.g., Boeing, SEC No-Action Letter, 2002 WL 32063404, at \*1, \*5-6 (Feb. 13, 2002) (stating that the company may exclude the proposal if the shareholder proponent does not recast the following sentence as an opinion: "The Company's diversity policy offends some current employees, and has contributed to eroding employee morale.").

<sup>245</sup> See generally *infra* Table 12.

<sup>246</sup> 17 C.F.R. § 240.14a-8(i)(3) (2013).

<sup>247</sup> *Id.* § 240.14a-8(i)(7).

Rule 14a-8(i)(3) permits a company to exclude shareholder proposals that violate “any of the Commission’s proxy rules, including [Rule] 240.14a-9,”<sup>248</sup> which prohibits materially false or misleading statements in proxy soliciting materials.”<sup>249</sup> Companies seeking to exclude LGBT-exclusive proposals on this basis have typically argued that the proposal is false and misleading in two ways: First, companies have argued unsuccessfully that characterizing an LGBT-exclusive EEO policy as “neutral” with respect to sexual orientation is misleading because the shareholder proponent is advancing arguments that are laden with negative value judgments about LGBT individuals.<sup>250</sup> Second, companies have argued, with mixed results, that certain portions of a proposal are false and misleading. While I have not found an instance where the SEC has allowed a company to exclude an LGBT-exclusive proposal in its entirety since 2000,<sup>251</sup> it will often require shareholder proponents to modify language contained in their proposals, as demonstrated in Table 12 below.

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<sup>248</sup> *Id.* § 240.14a-9.

<sup>249</sup> *Id.* § 240.14a-8(i)(3).

<sup>250</sup> *See, e.g.*, Bank of Am. Corp., SEC No-Action Letter, 2006 WL 475447, at \*5 (Feb. 22, 2006) (rejecting the company’s argument to exclude an LGBT-exclusive proposal as false and misleading because “the confusing and conflicting portions of the supporting statement of the Proposal, combined with the seemingly neutral language of the proposed resolution, create an uncertainty as to the subject matter of the vote in the current instance”).

<sup>251</sup> *See, e.g.*, Coca-Cola Co., *supra* note 243, at \*1 (requiring the shareholder proponent to modify its proposal based on Rule 14a-8(i)(3), rather than exclude the proposal in its entirety).

**Table 12: SEC Recommendations for LGBT-Exclusive Resolution  
Modifications to Permit Inclusion in Company's Proxy Materials**

Date of SEC Letter	Company	Statement	SEC Recommendation/ Rationale
Feb. 28, 2001	AT&T Corp.	"Whereas, some people are inclined to engage in sexual activity with members of the opposite sex, some people are inclined to engage in sexual activity with members of their own sex, some people are inclined to engage in sexual activity with members of both sexes, some people are inclined to engage in sexual activity with children, and some people are even inclined to engage in sexual activity with animals."	Delete (14a-9)
Feb. 13, 2002	Boeing	"The Company's decision to adopt written policies which include sexual orientation in a diversity blueprint and to bar discrimination based upon sexual orientation in all employment practices, has contributed to eroding employee morale in the Company, and otherwise could adversely impact the Company's business operations."	Recast as an opinion (14a-9)
Feb. 13, 2002	Boeing	"The Company's diversity policy offends some current employees [and] has contributed to eroding employee morale."	Recast as an opinion (14a-9)
Feb. 13, 2002	Boeing	"Potential employees may also be deterred from seeking employment with the Company."	Recast as an opinion (14a-9)
Feb. 13, 2002	Boeing	"Some skilled employees have sought employment elsewhere because of these policies."	Delete (14a-9)
Feb. 13, 2002	Boeing	"The proposal would not preclude the Company from complying with the laws in specific jurisdictions which preclude discrimination based upon sexual orientation."	Delete (14a-9)
Jan. 7, 2003	Coca-Cola	"The Company has incorporated in its 'diversity' program the promotion of alternative deviant sexual lifestyles into the company through promotion of the 'Atlanta Pride,' homosexual festival, and offering employee benefits to 'domestic partners.'"	Delete "promotion of alternative deviant sexual lifestyles into the company through promotion of the 'Atlanta Pride,' homosexual festival, and" (14a-9)
Jan. 7, 2003	Coca-Cola	"Research proves promoting homosexual lifestyles such as those in the Company's diversity programs promote pedophilia."	Delete (14a-9)

Jan. 7, 2003	Coca-Cola	"Many oppose policies offering special rights based on 'sexual orientation.'"	Identify the "special rights" (14a-9)
Jan. 7, 2003	Coca-Cola	"The promotion of deviant sexual lifestyles through the support of homosexual rights rallies, diversity training, and rewarding homosexual partners with the benefits of spouses of the opposite sex of married employees, has contributed to eroding employee morale, which impacts the Company's business operations, including a drop in stock prices and performance of the Company."	Provide factual support in the form of citation to a specific source (14a-9)
Jan. 7, 2003	Coca-Cola	"When put to a vote of citizens in government or shareholders in corporations, policies to reward deviant sexual behavior such as homosexuality have been rejected, most notable by Emerson Electric and Exxon Mobil."	Provide factual support in the form of citation to a specific source (14a-9)
Jan. 7, 2003	Coca-Cola	"Sexual orientation in the Company's diversity and equal employment opportunity policies has popularity with a minority of the Company's customers, employees and shareholders, but offends most because of their deeply held moral and religious beliefs."	Provide factual support in the form of citation to a specific source (14a-9)
Jan. 7, 2003	Coca-Cola	"The American Psychiatric Association declared homosexuality a psychiatric problem until homosexual rights activists changed it in 1973, and rewarding a psychiatric problem as a normal lifestyle will not help but rather harm the company."	Delete (14a-9)
Jan. 7, 2003	Coca-Cola	"As for pedophilia, the 1979 <i>The Gay Report</i> reported 73% of surveyed homosexuals admitted pedophilia."	Delete (14a-9)
Jan. 7, 2003	Coca-Cola	"The International Lesbian and Gay Association features pedophile groups, causing the United Nations to exclude it from the List of Non-Governmental Organisations."	Provide factual support in the form of a citation to a specific source (14a-9)
Jan. 26, 2006	Int'l Business Machines	"Whereas: Thomas Jefferson said in A Bill for Establishing Religious Freedom, 'To compel a man to furnish contributions of money for the propagation of opinions which he believes is sinful and tyrannical.'"	Delete (14a-9)

Jan. 26, 2006	Int'l Business Machines	"Charitable contributions come from the fruit of our employee's labor and belong to all shareholders as a group."	Delete (14a-9)
Jan. 26, 2006	Int'l Business Machines	"While there are thousands of charitable organizations, some charitable groups focus on shared sexual interests, especially the sexual interests of homosexuals, bisexuals and those persons who feel the sexual identity they were born with does not comport with their preferred 'gender expression' or 'gender identity.' Individuals in this later group are sometimes referred to as transgendered."	Delete (14a-9)
Jan. 26, 2006	Int'l Business Machines	"According to Karla Jay and Allen Young in their book, 'The Gay Report (Summit Books, 1979),' 99% of homosexual males engage in oral sex, 91% engage in anal sex, 82% engage in 'rimming,' 22% engage in 'fisting' and 23% engage in 'golden showers.'"	Delete (14a-9)
Jan. 26, 2006	Int'l Business Machines	"According to 1999 Medical Institute of Sexual Health report, 'Homosexual men are at significantly increased risk of HIV/AIDS, hepatitis, anal cancer, gonorrhea, and gastrointestinal infections as a result of their sexual practices.'"	Delete (14a-9)
Jan. 26, 2006	Int'l Business Machines	"Whereas, those who engage in homosexual sex are at a significantly higher risk for HIV/AIDS and sexually transmitted diseases."	Delete (14a-9)

Table 13: Failed Arguments for Excluding LGBT-Exclusive Resolutions

Date	Company	Company's Failed Argument
January 7, 2003	Coca-Cola	14a-8(i)(7), 14a-8(i)(3)
January 26, 2006	Int'l Business Machines, Corp.	14a-8(i)(3)
February 22, 2006	Bank of America Corp.	14a-8(i)(3), 14a-8(i)(7)
February 22, 2006	JP Morgan Chase & Co.	14a-8(i)(7)
February 23, 2006	Am. Express Co.	14a-8(i)(3), 14a-8(i)(7)
March 6, 2006	Ford Motor Co.	14a-8(i)(7)
February 24, 2011	PG&E Corp.	14a-8(i)(6)



## CONCLUSION

LGBT-inclusive proposals have been extraordinarily successful at effecting change. When analyzing only proposals that were brought to a shareholder vote, this Comment is in line with previous research that concludes that such proposals typically fail—in fact, only 5 out of the 69 LGBT-inclusive proposals brought to a vote from 2005 to 2012 received support from the majority of shareholders.<sup>252</sup> LGBT-inclusive proposals received, on average, a not-insignificant 30.0% of the shareholder vote.<sup>253</sup> Additionally, recent proxy seasons have yielded higher percentages of favorable votes, likely due to a multitude of factors, including increased adoption of inclusive policies among peer companies and changing social mores.<sup>254</sup> However, compared to other social policy issues, employment-based shareholder proposals are less frequently brought to a vote and more frequently resolved in negotiations between shareholder proponents and companies. Accounting for the number of proposals that are withdrawn in exchange for company concessions, the success rate is much higher. Fifty-nine percent of LGBT-inclusive proposals filed between 2005 and 2012 were immediately successful, resulting in an inclusive EEO policy.<sup>255</sup> Of the 33 companies where LGBT-inclusive proposals initially failed, 21 ultimately adopted inclusive EEO policies—10 of which were due to direct shareholder action, such as a shareholder vote or a withdrawn proposal.<sup>256</sup> Although companies often resist including such proposals in their proxy materials,<sup>257</sup> the SEC has generally rebuffed their requests to exclude such proposals<sup>258</sup> and has insisted on minimal modification of them, unlike their treatment of LGBT-exclusive proposals.<sup>259</sup>

This Comment demonstrates that LGBT-inclusive proposals have been an important catalyst for change in corporate nondiscrimination policies. That such change does not result from a shareholder vote yielding majority support, or, in many cases, a shareholder vote at all, underscores the importance of shareholder proposals in (1) bringing social issues to the attention of shareholders, management, and the public, and (2) facilitating dialogue among these groups—both of which result in tangible change.

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<sup>252</sup> See *supra* Table 6.

<sup>253</sup> See *supra* Table 8.

<sup>254</sup> See *supra* Table 9.

<sup>255</sup> See *supra* Table 6.

<sup>256</sup> See *supra* Table 7.

<sup>257</sup> See *supra* subsection IV.A.2.

<sup>258</sup> See *supra* subsection IV.A.3.

<sup>259</sup> See *supra* subsection IV.B.3.